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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRONTEL, LTD., et. al.,

Petitioners,

vs.

THE CITY OF NEW YORK, et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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144 pp

Questions Presented for Review

1. Was an antitrust claim properly dismissed without trial on grounds of state action immunity, where the defendants did not contest allegations that:

(a) the City was the largest owner of low and moderate income rental housing in the relevant market;

(b) the City as a competitor of private owners, fixed rents charged by private owners;

(c) the City fixed private rents at levels below cost while exempting itelf from these restrictions;

(d) City controls operated in an increasingly onerous manner, including addition of numerous uncompensated mandated services, although purported State authorization specifically set

forth the goal a free market and prohibited controls from becoming more onerous after 1971;

(e) the City refused to take effects of its own regulations into account in fixing assessed values of properties greatly in excess of fair market values;

(f) the properties involved suffered large operating losses as a result of the City's own conduct were consequently taken by the City for nonpayment of real estate taxes;

(g) this process on a large scale led to City monopolization of an ever larger portion of the relevant markets;

(h) these events contributed to a worsening critical shortage of housing with adverse consequences to the

consumers and federal taxpayers involved.

2. Was a claim seeking enforcement of a settlement in federal litigation under 42 U.S.C. §1983 properly dismissed for lack of subject matter jurisdiction?

Parties to the Proceeding in the United States Court of Appeals for the Second Circuit

Petitioners Brontel, Ltd. and Rent Control Memorial Corp.[1] are all parties to the proceeding in the United States Court of Appeals for the Second Circuit, the order of which is sought to be reviewed. The other parties to the

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[1]Petitioners are privately held corporations that have no parent companies, subsidiaries or affiliates, except that Brontel, Ltd., Rent Control Memorial Corp., Friarton Estates Corp. and West Paterson 46 Corp. may be deemed to be affiliates of each other. Natural persons and partnerships own the petitioners and have ownership shares in other unrelated entities.

proceeding in the Court of Appeals are respondents the City of New York, the Finance Commissioner of the City of New York and the Tax Commission of the City of New York.

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October Term 1984

BRONTEL, LTD., et al.,

Petitioners,

vs.

THE CITY OF NEW YORK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 13, 1984,

which affirmed dismissal of petitioners' claims under the Sherman Act on grounds of state action immunity, and dismissal of petitioners' claims for enforcement of a settlement in a prior federal case on grounds of lack of jurisdiction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, entered on April 13, 1984, affirming the decision of the United States District Court for the Southern Distict of New York dismissing petitioners' claims, was not reported. It is reproduced in the Appendix (1a).[1]

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[1] References to the Appendix to this Petition are in the form "-a"; references to the Joint Appendix below are in the form "JA--".

The opinion of the District Court was reported at 571 F. Supp. 1065 (S.D.N.Y. 1983) and is reproduced in the Appendix (48a).

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit affirming dismissal of petitioners' claims was entered on April 13, 1984. This petition was timely filed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sherman Act (15 U.S.C. §§1, 2):

§1 - "Every contract, combination...or conspiracy, in restraint of trade or commerce among the several States... is declared to be illegal...."

§2 - "Every person who shall monopolize, or attempt to monopolize...any part of the trade or commerce among the several States...shall be guilty...."

28 U.S.C. §1331: "The district courts shall have original jurisdiction of all civil actions...arising under the Constitution, laws, or treaties of the United States."

STATEMENT OF THE CASE

The City's Antitrust Violations as Set forth Before the District Court and Facts Relevant to State Action Immunity

According to the antitrust claim of the amended complaint, which the District Court dismissed for failure to state a claim due to the existence of state action immunity (25a-31a), supplemented by affidavits filed by both sides (84a):

1. Rents under City controls were as low as $30.10 per month at 12 East 116th Street (56a) and $44.92 per month at 415 East 12th Street (45a).

2. As a result of these low rent levels combined with the addition, since 1971, of many newly required

services (61a-67a), the buildings experienced large operating losses (50a-51a, 57a).

3. The City assessed these two properties and the vacant 28 West 116th Street at high multiples of fair market value (46a, 52a-55a) without permitting trial on the assessments, thus refusing to take the effects of its own restrictions into account (49a, 52a-55a).

4. Inability of the buildings to meet expenses under City controls, including real estate taxes as assessed by the City, resulted in the taking of the properties by the City (48a, 53a-54a, 57a).

5. As a result of this process, the City has taken over a rapidly increasing share of low and moderate income

rental housing in the City (84a-92a), resulting in

(a) higher rents to tenants since the City does not abide by its own rent controls (60a-61a);

(b) burdens on City and federal taxpayers to support and rehabilitate the properties taken (59a); and

(c) the inability of low and middle income people to afford housing due to increased shortages (84a-92a).

The Settlement Agreement in 42 U.S.C. §1983 Litigation, Its Violation, and Dismissal of Petioner's Claim for Enforcement for Lack of Jurisdiction

The complaints in the present case were originally filed on April 27, 1982 (JA 5) pursuant to 42 U.S.C. §1983. They alleged confiscatory taking by the City of the properties involved without

affording the owners an opportunity to contest the City's conduct or obtain review of the validity of the assessments, in violation of the Fourteenth Amendment to the Constitution of the United States (JA 7-36; 49a, 54a-55a). The owners alleged that the properties were assessed at large multiples of fair market value and that the City had successfully obstructed tax certiorari trials to review the assessments since 1973 (Id.).

Earlier, a separate §1983 complaint relating to other properties held by other owners having partial common ownership was filed, Friarton Estates Corp. v. City of New York, 81 Civ. 7881. The City defended against both actions on the ground that prior

rulings in state court in rem tax foreclosure proceedings were res judicata.

State Court In Rem Tax Foreclosure Proceedings

In the in rem foreclosure proceedings, the owners sought to raise several defenses: assessments at high multiples of fair market value, inequality of assessmments, and the City's failure to take the effect of City controls into account in the assessments. The City contended such defenses were procedurally unavailable in an in rem foreclosure proceeding under N.Y.C. Admin. Code §D17-9.0(d).

The State court held in an unreported decision that the owners must pay sums asserted to be concededly due prior to raising such defenses although the owners did not know their

ultimate liability and suffered a negative cash flow from operating losses under City controls (see 50a-51a, 57a). This decision was affirmed by the Appellate Division, City of New York v. Friarton Estates Corp., 79 A.D.2d 899, 435 N.Y.S.2d 871 (1980). The New York State Court of Appeals dismissed the owners' appeal on the ground that no "substantial constitutional question" was "directly involved," 53 N.Y.2d 795 (1981).

The owners thereafter filed a Petition for certiorari in this Court, while noting that District Court litigation had been filed challenging the totality of City conduct including but not limited to the in rem foreclosure as violative of the Fourteenth

Amendment. This Court denied certiorari, 454 U.S. 837 (1981).

The Injunction Against the City, Its Reversal of this Court's Extension of Time

On October 2, 1981, the District Court in the Friarton case (Charles L. Brieant, J.), granted a preliminary injunction against the City on the ground that owners had shown that the City had obstructed trials of tax certiorari cases not held since 1973:

> [D]ue to the City's successful and indefinite procedural obstruction of plaintiffs' prosecution of their tax certiorari actions, there is uncertainty as to when, if ever, plaintiffs will be able to obtain a tax certiorari trial on the merits of their inequality and over-assessment claims. Confirming the inadequacy of the state remedy is the refusal or procedural inability of the New York Supreme Court to consider plaintiffs' defense of invalidity of the tax on the merits

in In Rem Foreclosure Action No. 29.

Friarton Estates Corp. v. City of New York, 525 F. Supp. 1250, 1259-60 (S.D.N.Y. 1981); see also 55a.

The United States Court of Appeals for the Second Circuit reversed on June 7, 1982, holding that state court decisions in the in rem foreclosure litigation were res judicata as to the constitutional questions involved, 681 F.2d 150 (2d Cir. 1982), but noting that trials had been projected in such tax certiorari cases. Id. at 154, 160.[2] The Court then suggested a settlement, stating "we would hope, although we cannot properly require," that the City keep open a prior

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[2]These were never permitted according to the allegations below (4a, 54a-55a).

settlement offer. Id. at 160.[3]

Settlement discussions ensued, and in order to preserve all rights during the negotiations, Friarton requested and obtained from Justice MARSHALL an extension to October 7, 1982, of the time to petition for certiorari from the June 1982 decision of the Court of Appeals, (93a-94a).

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[3] "In so doing we would hope, although we cannot properly require, that the City will leave open for a reasonable period of say 30 days from the coming down of our mandate the opportunity to plaintiffs to avoid execution by paying the water, rents, sewage charges and the taxes resulting from plaintiffs' own valuation and agreeing to pay the balance of taxes found to be due within 60 days of entry of a state court judgment following adjudication of the tax certiorari cases and any appeal of such an adjudication, to which we have previously referred. Now that the string has been played out, plaintiffs may consider the latter opinion more seriously than they did last summer when the City renewed its offer." Id.

The Settlement and the Claims to Enfore It

A settlement was arrived at on September 21, 1982 (73a) covering both the parcels involved in Friarton and also those involved in the pending present Brontel litigation (74a).

The settlement provided for reduction of the allegedly unconstitutional assessments, required certain payments to the City, and called for a recommendation by the City to its Board of Estimate for approval of the owners' redemption of their parcels (73a-74a). The owners made very substantial payments under the settlement (79a-80a).

Subsequently, however, the amended complaint asserted that the City had unilaterally repudiated the settlement

and sought its enforcement (73a-83a).

The District Court determined that this was merely a state claim, and hence there was no independent Federal jurisdiction to enforce the settlement and declined to exercise pendent jurisdiction (36a). The Court of Appeals for the Second Circuit affirmed (1a-4a).

REASONS FOR GRANTING THE WRIT

I. State Action Immunity was Improperly Found Endangering the Purposes of the Sherman Act, Where the City is Increasing Its Dominant Share of the Market by Compulsory Predatory Price Fixing

The decision below establishes total and automatic - in effect blanket - immunity for combined use of municipal proprietary and regulatory powers to fix competitors' prices below cost,

leading to a major and rapidly increasing position in the relevant market, despite explicit articulation of the goal of a free market by state law, which provides:

> [T]hat the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state policy, must be administered with due regard for [the] emergency ....

N.Y. Unconsolidated Laws §8602, L. 1962, ch. 21, §1(2).

Price fixing among competitors is, of course, illegal, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980), and the City here is a major and rapidly increasing competitor in the market (84a-92a). Pricing below the additional cost of providing an item is likewise generally considered

predatory and a violation of the Sherman Act when it enhances a party's dominant market position, see, e.g., Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

Compulsory pricing below operating costs (50a-51a) clearly represents an extreme combination of elements noxious to the state goal of a free market. Cf. FMC v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968) (veto by competitors over pricing by others).

State law, moreover, barred burdens "... more stringent or restrictive than those presently in effect" in 1971 without specific state approval. Urstadt Act, N.Y. Unconsolidated Laws §8605, L. 1971, ch. 1012, §1. Yet

City-fixed rents remained at levels below operating costs although expensive mandatory services without additional compensation were added (61a-67a), and assessments for tax purposes failed to take these realities into account (46a, 52a-55a).

State authorization or overall validity of rent control in general should not, as held by the District Court (28a-31a), be stretched to cover such a pattern of conduct alleged in the complaint, which should be taken as true for present purposes.[4] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 403 (1978).

The resulting asphixiation of the private low and moderate income rental

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[4]Leave to file proposed amended complaint was granted below (JA 5).

housing market should not be inferred as a matter of law without trial to meet the requirements of conforming to a state policy to displace competition, as required under this Court's decision in Lafayette (involving proprietary activity). Nor can it be viewed as based on a "clearly articulated and affirmatively expressed state policy" as called for by Community Communications Co. v. City of Boulder, 455 U.S. 40, 51 (1982) (involving use of regulatory authority).

Moreover, state law should not be construed to contemplate ultimate physical takings without compensation as a result of the City's own conduct (48a, 53a-54a, 57a). General provisions of state law should not lightly

be construed so as to contravene the Fourteenth Amendment as interpreted by this Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

Further, the conduct described in the complaint created a large and rapidly increasing City position in low and middle income rental housing, achieved by anticompetitive compulsion (see 84a-92a). It did not merely involve some City ownership of formerly private housing, or investment in housing built with public funds in whole or in part.

The proprietary activities involved thus are not "traditional government functions", City of Lafayette v. Louisiana Power and Light Co., 435 U.S.

389, 424 (1978) (CHIEF JUSTICE BURGER, concurring), such as the "public parks" mentioned in National League of Cities v. Usery, 426 U.S. 833, 843 (1976), quoting New York v. United States, 326 U.S. 542, 587-88 (1940), or bus service as in e.g., City of North Olmstead v. Greater Cleveland Regional Transit Authority, 722 F.2d 1284 (6th Cir. 1983), cert. denied, 104 S. Ct. 2387 (1984).

The City conduct here is far less defensible as part of any traditional municipal services than the sewage treatment and collection services involved in Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), cert. granted 52 U.S.L.W. 3891 (U.S. June 12, 1984) (No. 82-1832).

See also Gold Cross Ambulance & Transfer, Inc. v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3039 (U.S. Aug. 9, 1983) (No. 83-138) (ambulance service); Central Iowa Refuse Systems v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3441 (U.S. Dec. 6, 1983) (No. 83-825) (refuse disposal).

The consequences of the conduct described below (85a-92a) have been extreme.

In 10 of the 59 City's community districts, 65% of all residential housing units have already been seized by the City. In community district No. 3, for example, 95% of all housing

units have either been seized or are in the process of being seized by the City.

More than 500,000 residential apartment units have been destroyed in the past fifteen years. This constitutes approximately 25% of all rental housing units that were in existence in New York City in 1973, and has caused the City to increase its ownership of the low and middle income rental housing market to at least 35%.

Meanwhile, it is reliably reported that the City is still seizing approximately 30,000 to 40,000 more privately-owned apartments per year. N.Y. Times, Jan. 6, 1984, at B4, col. 1.

The City has admitted, in publicly filed documents, the consequences of its destruction of the housing industry:

> The housing stock of the City has been steadily declining in recent years.
>
> ... [T]he City had approximately 2,783,000 housing units in 1978 .... This represents a net loss of some 56,000 housing units from the 1975 total.
>
> Rental housing units predominate in the City, accounting for 1,989,000 of the City's housing units in 1978 .... Housing in the City remains in short supply and is also expensive. The City's vacancy rate for rental housing units was 2.95% in 1978, and median rent that year was $210.
>
> ... The quality of the housing stock has deteriorated in recent years. Over 40% of the housing stock was built prior to 1929. Measures of housing abandonment or disinvestment, such as housing code violations, vacant building and tax foreclosures, increased during the past decade.

The City of New York, Official Statement - General Obligations Bonds, July 16, 1981, p. A-13.

Defendants' anticompetitive acts and practices, which have made it vitrually impossible for lower and middle income people to find affordable housing in New York City, indicate that total and absolute immunity to the antitrust laws is unwarranted and against the public interest.

There is no dispute about the existence of the critical shortage of rental apartments in the relevant market area, New York City (see N.Y. Times, Jan. 6, 1984, B4, col.1). Defendants have caused the critical housing shortage by wiping out private investment in the low an middle income

residential apartment market, making it financially impossible for many property owners to maintain their buildings in good condition. Experts have concluded that "the magnitude of housing destruction in New York City far exceeds what the normal market processes would generate, even under the most adverse of circumstances...." P. Salins, The Ecology of Housing Destruction, 34-35 (1980).

The effects of the City's strangulating web of anticompetitive conduct as described in the complaint on interstate commerce as well as on taxpayers at all levels, see N.Y. Times, July 5, 1984, at D8, can hardly be denied. Compare Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738

(1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949).

The remedy for this if a violation is found, of course, is not as yet before the District Court. Compare S. 1578, 98th Cong., 2d Sess. (1984) (to permit only injunctive relief against local governments).

Dismissal without trial, however, was unjustified and contrary to the decisions of this Court. It raises important issues of antitrust law, of great public importance, justifying review by this Court.[5]

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[5]The other related claims asserted in the District Court, including those dismissed as pendent, should also be tried if the District Court erroneously dismissed the antitrust claims.

II. The decision below conflicts with decisions of the First and Ninth Circuits and on an important question of federal law - whether state action immunity should be inferred from generally phrased state authorization where municipal regulatory power is used anticompetitively to further proprietary activity.

It is undisputed that there was no specific state authorization for the City conduct challenged here including (1) acquisition of rapidly increasing preeminent ownership of low and middle income rental housing, (2) compulsory predatory pricing, and (3) the failure to take City restrictions into account in City assessments (28a-31a).

The Court below, however, inferred total and absolute immunity from an overall state authorization of City rent controls and taxing authority in general (Id.). This conflicts with

decisions of the First and Ninth Circuits and in the Seventh Circuit.

In Parks v. Watson, 716 F.2d 646 (9th Cir. 1983), a city refused to permit a builder to use land marked ("platted") as city streets unless adjacent geothermal wells were dedicated to the City. Id. at 649-50. While street locations mapped by municipalities may be characterized as proprietary, they also have an obvious traditional governmental regulatory role in assuring access to transportation; the city also had authority to own geothermal resources. Nevertheless the Ninth Circuit held that there was no basis to assume state authorization for the anticompetitive conduct alleged

and held that no exemption applied. Id. at 662-64.

In Corey v. Look, 641 F.2d 32 (1st Cir. 1981), a town required a parking lot operator to obtain a special permit not required of a governmental competitor and "severely restricted the times at which appellant was allowed to charge customers for using his facilities." Id. at 34. The First Circuit found no immunity and reversed dismissal of a complaint charging the two governmental defendants with, among other things, "hampering through severe regulations [plaintiff's] ability to use land he obtained from other suppliers .... in order to eliminate appellant as a competitor." Id. at 36.

In Vickery Manor Service Corp. v. Village of Munderlein, 575 F. Supp. 996 (N.D. Ill. 1983) in the Seventh Circuit, an antitrust complaint alleged imposition of unreasonable conditions on required permits and approvals as a means of promoting competing municipal services, Id. at 997-98. The complaint was upheld against a motion to dismiss based on state action immunity flowing from generalized state authorization.

The conflict between the decision below and these cases by the First and Ninth Circuits and in the Seventh Circuit is important because of the anticompetitive effect if regulatory power can be employed as an adjunct to proprietary monopolization (84a-92a).

III. Dismissal of petitioners' claim for enforcement of a settlement in federal litigation excessively narrows the scope of District Court jurisdiction, conflicting with decisions of the Fourth and Sixth Circuits.

The Court below affirmed dismissal of petitioners claim for enforcement of a settlement of claims in this very litigation (74a), which was also part of a comprehensive settlement of related litigation (73a-83a) arrived at upon the suggestion of the United States Court of Appeals for the Second Circuit in Friarton Estates Corp. v. City of New York, 681 F.2d 150, 160 (2d Cir. 1982). See also (76a-78a). Justice MARSHALL extended the plaintiffs' time to petition for certiorari in that case so that the settlement involved could be negotiated without

loss of plaintiffs' opportunity to seek review in this Court (93a-94a).

By summarily finding lack of jurisdiction to enforce this very settlement (36a), which the City itself announced to the District Judge in open Court (JA 219) in accordance with signed documents, the courts below limited the scope of jurisdiction under 28 U.S.C. §1331 in a way that could result in inhibiting settlements and their effectuation in federal litigation. This conflicts with rulings in the Fourth and Sixth Circuits.

In Aro Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir.), cert. denied 429 U.S. 862 (1976), federal jurisdiction to enforce settlements was upheld "[e]ven in those instances in

which the court's original jurisdiction may have been questionable" in part because to rule otherwise "would be to exalt form over substance and to render settlement in such cases a trap for the unwary." Id. at 1371.

In Gamewell Manufacturing v. HVAC Supply, 715 F.2d 112 (4th Cir. 1983), the Fourth Circuit held that the criteria for settlement of federal cases were matters of federal law:

> Once a claim -- whatever its jurisdictional basis -- is initiated in the federal courts, we believe that the standards by which that litigation may be settled ... are preeminently a matter for resolution by federal common law principles.... Id. at 115.

It is obvious that §1331 jurisdiction would exist over this federal question.

In an earlier decision in Fairfax Countywide Citizens Association v.

Fairfax County, 571 F.2d 1299 (4th Cir.), cert. denied, 439 U.S. 1047 (1978), the Fourth Circuit also indicated that jurisdiction would exist where as here the "same nucleus of operative facts" was involved in the settlement and the federal claim for which jurisdiction existed. Id. at 1305. Here, this nucleus involved reduction by the settlement of the allegedly confiscatory unequal assessments (74a) claimed below (JA 7-36; see also 49a, 55a) to have been imposed without permitting the owners a day in Court despite assertions by the City that this would be provided (49a, 54a-55a).

The resolution of the conflict over this important issue of jurisdiction

under 28 U.S.C. §1331 to enforce settlements of federal litigation warrants review by this Court.

CONCLUSION

A writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel of Record for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of April, One Thousand Nine Hundred and Eighty-four.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. RICHARD J. CARDAMONE,
Circuit Judges

- - - - - - - - - - - - - - -x
BRONTEL, LTD.,

Plaintiff-Appellant,

v.

THE CITY OF NEW YORK, PHILLIP R. MICHAEL, as COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and TAX COMMISSION OF THE CITY OF NEW YORK,

Defendants-Appellees

- - - - - - - - - - - - - - -x
RENT CONTROL MEMORIAL CORP. and BRONTEL, LTD.,

Plaintiff-Appellants,

v.

ORDER
83-7881

THE CITY OF NEW YORK, PHILLIP R. MICHAEL, as COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and TAX COMMISSION OF THE CITY OF NEW YORK,

Defendants-Appellees

- - - - - - - - - - - - - - -x

Appellants, Brontel, Ltd. and Rent Control Memorial Corp., appeal from an

Opinion and Order of the District Court for the Southern District of New York (Weinfeld, J.) entered September 23, 1983, and reported at 571 F. Supp. 1065, dismissing appellants' claims against the City of New York, its Commissioner of Finance and its Tax Commission.

We affirm substantially for the reasons given in the district court's opinion.

/s/ William H. Timbers
Hon. William H. Timbers

/s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

/s/ Richard J. Cardamone
Hon. Richard J. Cardamone

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise

used in unrelated cases before this or any other court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRONTEL, LTD.,

Plaintiff,

v.

THE CITY OF NEW YORK, PHILLIP R. MICHAEL, as COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and TAX COMMISSION OF THE CITY OF NEW YORK,

Defendants.

82 Civ. 2666

RENT CONTROL MEMORIAL CORP. and BRONTEL, LTD.,

Plaintiff,

v.

THE CITY OF NEW YORK, PHILLIP R. MICHAEL, as COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and TAX COMMISSION OF THE CITY OF NEW YORK,

Defendants.

82 Civ. 2664
OPINION

MARTIN R. FINE, ESQ.
644 Broadway
New York, New York 10012

Attorney for Plaintiffs

FREDERICK A. O. SCHWARZ, JR., ESQ
Corporation Counsel
100 Church Street
New York, New York 10007

Attorney for Defendants

Steven Resnick, Esq.
Assistant Corporation Counsel
Of Counsel

EDWARD WEINFELD, D. J.

This is still another action by plaintiffs, who over the years have engaged in extensive litigation with the City of New York, its Tax Commission and others (collectively "the City"), challenging the City's tax assessments on three of plaintiffs' properties. Plaintiffs acquired the properties in 1975 and 1976 and to date have not paid a single penny of assessed taxes, not even the amount due based upon their own estimate of fair valuation for tax purposes. In 1981 the City acquired title to the three properties pursuant to in rem judgments of foreclosure entered in the Supreme Court of the State of New York because of nonpayment of real estate taxes.[1] Plain-

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[1] The City maintains that it acquired one of the properties in 1978 rather

tiffs have challenged the foreclosure proceedings since their commencement in 1977. This action is a further attempt to overcome the judgments of foreclosure and regain the properties. Plaintiffs' twice amended complaint contains fourteen prolix and widely discursive claims that, stripped to essentials, allege:

> 1. The City violated plaintiffs' right to due process of law and deprived them of their property in violation of the Fourteenth Amendment by denying them a prompt determination of certiorari proceedings they had instituted to challenge the assessments on the properties;
>
> 2. The City restrains trade by imposing rent control upon privately owned property, and monopolizes trade by exempting city-owned property from rent control and other local laws regarding residential buildings, in

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than 1981, and that the claims as to that property are barred by the statute of limitations. It is unnecessary to reach that issue, however, because the claims are dismissed on other grounds, as explained infra.

violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, 3;

3. The City's rent control, property tax, and housing laws and regulations have destroyed the value of plaintiffs' properties and therefore constitute an inverse condemnation or "taking" for which just compensation is required by the United States and New York Constitutions;

4. The City's rent control regulations impair the obligation of contracts in violation of article I, section 10 of the United States Constitution;

5. The City unlawfully refused to allow plaintiffs to redeem the properties;

6. The City destroyed a building on one of the premises, without notice to plaintiffs, and without reason;

7. The City breached an alleged agreement to settle this litigation.

The City moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6) and 56 for failure to state a claim upon which relief can be granted and on the

grounds of res judicata and collateral estoppel. The plaintiffs cross-moved pursuant to Fed. R. Civ. P. 65 for a preliminary injunction enjoining the City from continuing its alleged violations of law pending a trial of the issues. Each side submitted extensive affidavits and briefs in support of their respective positions. The motion for a preliminary injunction was denied upon the conclusion of oral argument as utterly lacking in substance.

THE DEFENSE OF RES JUDICATA AND COLLATERAL ESTOPPEL

The rule of res judicata provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter barred from relitigating the same

cause of action in a subsequent suit, absent fraud or some other factor invalidating the judgment.[2] The doctrine extends not only to issues actually determined, but also to the claims that could have been raised in the prior action.[3] Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in a subsequent suit on a different cause of action involving a party to the prior litigation.[4] These

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2 Sea-Land Services Inc, v. Gaudet, 414 U.S. 573, 578-79 (1974); Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1232-33 (2d Cir.), cert. denied, 434 U.S. 903 (1977).

3 Sea-Land, supra note 2, at 579.

4 Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S 322, 326 n. 5 (1979).

related defenses of collateral estoppel and res judicata, advanced by the City in support of its motion, require an examination of the long and convoluted prior litigation that preceded the instant action.

The prior state court litigation

In 1977, the City commenced In Rem Action No. 29 in the Supreme Court of the State of New York to foreclose all properties in New York City that were delinquent in taxes including the three properties owned by plaintiffs: 28 West 116th Street, 415 East 12th Street, and 12 East 116th Street. Plaintiffs opposed the foreclosure action denying that they were in arrears in the payment of "lawfully assessed" taxes and charges, and asserting two counterclaims. The first

alleged that the City had confiscated the properties through the application of rent control laws, without just compensation, in violation of the New York and United States Constitutions, and sought damages. The second asserted that the properties were not properly subject to a foreclosure action because tax certiorari proceedings[5] were pending that challenged the legality of the assessments.

Plaintiffs' properties were severed from Action No. 29 in May, 1978. The City then moved for summary judgment of the severed foreclosure claim. Plaintiffs cross-moved for leave to amend their answers and for an order consolida-

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5 For a description of the New York procedures for review of real estate tax assessments, including the tax certiorari procedures, see Friarton Estates Corp. v. City of New York, 681 F.2d 150, 152-54 (2d Cir. 1982).

ting the foreclosure action with their tax certiorari actions. Plaintiffs also joined with Friarton Estates, and other litgants not relevant here, seeking class action certification and consolidation of the City's foreclosure Action No. 29 with Action No. 30, which the City had commenced in August, 1978.

On August 31, 1979, Justice Martin Evans, of the New York Supreme Court, granted plaintiffs' motion to consolidate Actions No. 29 and 30, and granted in part their motion to amend their answers. The answers as amended retained the counterclaim charging the City's rent control laws were unconstitutional, and alleged as an affirmative defense that it would be inequitable to foreclose the properties while tax certiorari proceed-

ings were pending and a denial of due process to allow the City to proceed with its in rem foreclosure actions absent a consolidation of their pending certiorari proceedings. After considering the answers as amended, Justice Evans granted summary judgment in favor of the City. He severed the counterclaim regarding the constitutionality of rent control. He denied consolidation of the foreclosure and certiorari actions, stating:

> It would, of course, be inequitable to allow In Rem foreclosure under Title D of the Administrative Code, which could result in a transfer of title to the City, if in fact the taxes were improperly over-asessed and if defendant did not have a reasonable opportunity to obtain a proper assessment. Such a transfer of title would be an unconstitutional taking of property without compensation.

However, he found that:

> . . . the City has shown that

> taxes were properly assessed and have not been paid. Although the pleadings of the defendant allege that all taxes lawfully due have been paid, it is clear from the affidavits submitted on the motion that not only is there a default in the payments of the amount of taxes assessed; there has been a default in the payments of the amount admitted by defendants to have been properly due.

On May 20, 1980, an amended supplemental judgment of foreclosure was entered and the City was awarded possession of the properties. Plaintiffs and Friarton appealed to the Appellate Division, arguing again that the tax assessments were excessive because rent control had depressed the value of the properties, and that foreclosing the properties without affording plaintiffs an opportunity to challenge the tax assessments in certiorari proceedings denied plaintiffs

due process of law. The Appellate Division affirmed without opinion.[6]

Plaintiffs and Friarton appealed to the New York Court of Appeals, which dismissed the appeal "upon the ground that no substantial constitutional question is directly involved."[7] The City then moved to enforce the amended supplemental judgments of foreclosure. Plaintiffs and Friarton cross-moved to vacate the foreclosure judgments, on the grounds of newly discovered evidence, and fraud and misrepresentation by the City in its "repeated stat[ments] that trials on the merits of the taxes could be obtained promptly . . . and represent[ations] to

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6 79 A.D.2d 899, 435 N.Y.S.2d 871 (N.Y. App. Div. 1980).

7 53 N.Y.2d 795, 439 N.Y.S.2d 1031, 422 N.E.2d 597 (N.Y. 1981).

the owners and to this Court that the certiorari proceedings would come to trial 'by the fall of 1980.'" Justice Evans denied the plaintiffs' motion to vacate the foreclosure judgments, and the City finally acquired title to the properties on August 11, 1981. Plaintiffs and Friarton petitioned the United States Supreme Court for certiorari, which was denied.[8]

The prior federal court litigation

Friarton then filed an action in the Southern District of New York with respect to the eight properties it had owned. It sought an injunction against enforcement of the foreclosure judgments until the state tax certiorari proceedings had been concluded, and damages for

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8 454 U.S. 837 (1981).

alleged violations of its constitutional rights. The District Court granted a preliminary injunction;[9] the Second Circuit reversed, holding that Friarton's constitutional claims were barred by the res judicata effect of the state court proceedings.[10]

In April, 1982, after argument of the appeal, but before the Court of Appeals handed down its decision, plaintiffs, who had not joined the Friarton action, brought this action, seeking the same relief Friarton had sought. When the City moved to dismiss plaintiffs' initial complaint in this action, plaintiffs applied for and were granted leave to serve an amended complaint, which con-

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9 525 F. Supp. 1250 (S.D.N.Y. 1981), rev'd, 681 F.2d 150 (2d Cir. 1982).

10 681 F.2d 150 (2d Cir. 1982).

tained antitrust, takings, tort and contract claims.

Res Judicata Effect of the Prior State Litigation

Plaintiffs' claim that the City violated their right to due process by foreclosing their properties without affording them an adequate opportunity to challenge the tax assessments, and their claim that the City has taken their properties without just compensation, however variously alleged,[11] were presented to,

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11 In this action, plaintiffs style their takings claim as "inverse condemnation," alleging that the combination of rent control, housing regulations and tax assessments have so destroyed the value of their properties as to be a condemnation for which just compensation is required. But as this Court has previously noted, "[a] shift in legal theories or a new or different ground for relief sought does not of itself work magic and dissolve the defense of res judicata. . . . [A] plaintiff cannot 'escape the effect of the adverse determination by clothing

and passed upon by, the New York State trial and appellate courts. As Judge

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the claim in a different garb.'" Goldstein v. Doft, 236 F. Supp 730, 734 (S.D.N.Y. 1964), aff'd, 353 F.2d 484 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966) (quoting Frost v. Bankers Commercial Corp., 11 F.R.D 195 (S.D.N.Y. 1951), aff'd, 194 F 2d 505 (2d Cir. 1952)). As Judge Friendly noted in Friarton, plaintiffs' claim that foreclosure of the properties was an unconstitutional taking was denied on the merits by the state court. Friarton, supra note 10 at 159. Plaintiffs cannot relitigate that claim merely by arguing now that it is the laws allegedly causing the foreclosure, such as rent control, that constitute the taking.

In addition, the constitutionality of rent control is well established. See e.g., Bowles v. Willingham, 321 U.S. 503 (1944); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); Somerset-Wilshire Apartments, Inc. v. Lindsay, 304 F. Supp. 273 (S.D.N.Y. 1969); Stoneridge Apts. Company v. Lindsay, 303 F. Supp. 677 (S.D.N.Y. 1969); Israel v. City Rent and Rehab. Admin. of City of New York, 285 F. Supp. 908 (S.D.N.Y. 1968); Benson v. Beame, 50 N.Y.2d 994, 431 N.Y.S.2d 475, 409 N.E.2d 948 (N.Y. 1980), appeal dismissed, 449 U.S. 1119 (1981).

Friendly stated in the Friarton federal litigation, in referring to the state court action in which plaintiffs were joined with Friarton, the record "leaves no room for doubt that the claims of lack of due process and taking of property without just compensation were fully presented to the New York courts, and that those courts entertained them but denied them on the merits."[12] More specifically, he noted:

> All the constitutional contentions . . . the long delays in the proceeding of certioraris, the inequity of foreclosure for failure to pay possibly erroneous taxes without an opportunity for timely challenge, the allegedly unsatisfactory character of the remedies of partial payment which plaintiffs had by virtue of statute and of the City's ad hoc offer -- were advanced not once but time and again at each of the three levels of the New York court system and on petition for

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12 Friarton, supra note 10 at 159.

certiorari to the United States Supreme Court.[13]

The plaintiffs' persistent disregard of the state court judgment underscores Judge Friendly's observation in Friarton:

> On any view a taxpayer may not engage in extensive proceedings throughout the state court system, and then, after every point has been decided against him by the state courts and the Supreme Court has denied certiorari, make a fresh start in federal court. These considerations are of particular pertinence where a federal court plaintiff seeks further delay in the collection of city taxes of which, in state court proceedings, he has thwarted collection, even of water and sewage charges, for eight years.[14]

Judge Friendly directed the dismissal of the plaintiff's complaint because it "had no equity to support it."[15]

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13 Id. at 158.

14 Id. at 159.

15 Id. at 161.

It is abundantly clear that plaintiffs' due process and takings claims were presented to and determined by the state courts in an action in which they were parties. Accordingly, the claims are dismissed because they are barred by res judicata.[16] However, this is not true as to the antitrust, tort, contract and unlawful refusal to redeem claims first advanced in the second amended complaint. The antitrust claims were not pleaded in the state courts, which have no jurisdiction to decide federal antitrust claims.[17] The tort, contract and

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16 Plaintiffs' argument that the prior judgment should have no res judicata effect because it was procured by fraud is without merit. As indicated previously, plaintiffs raised the fraud argument in their motion to vacate the judgment, and Justice Evans denied that motion.

17 Capital Tel. Co., Inc. v.

unlawful refusal to redeem claims are based upon events alleged to have occurred after the entry of final judgment in the state court.

THE ANTITRUST CLAIMS

The City argues that the antitrust claims fail to state a claim upon which relief can be granted because the City's actions fall within the Parker v. Brown[18] state action exemption to antitrust laws.[19] In Parker, the Supreme Court

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Pattersonville Tel. Co. 81 A.D.2d 970, 439 N.Y.S.2d 759 (N.Y. App. Div. 1981), aff'd, 56 N.Y.2d 11, 451 N.Y.S.2d 11, 436 N.E.2d 461 (N.Y. 1982). See Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), cert. denied, 350 U.S. 825 (1955).

18 317 U.S. 341 (1943).

19 The City also contends that plaintiffs' antitrust claim is barred by the collateral estoppel effect of the Friarton federal litigation. They allege that plaintiffs' attorney here, who is also plaintiffs' Vice President,

held that a program to restrict competition and maintain prices among raisin growers was exempt from antitrust laws because the program "derived its authority ... from the legislative command of the state" and "nothing in the language of the Sherman Act or in its history ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[20]

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acted as counsel to the Friarton plaintiffs in their federal action, and was Friarton's principal officer. The City maintains that through him plaintiffs "assumed control over" the Friarton litigation "in aid of some interest of [their] own" and thus should be bound by Friarton, in which the antitrust claims could have been presented. Montana v. United States, supra note 4, at 159. While there may be some substance to this contention, the Court prefers to decide the antitrust claim upon the merits of the City's motion to dismiss for failure to state a claim.

20 Parker, supra note 18, at 350-51.

The Supreme Court addressed the availability of the Parker exemption to a state's municipalities in two recent cases. In Lafayette v. Louisiana Power and Light Co.,[21] a plurality of the Court held that Parker applies to municipalities if they are acting "pursuant to a state policy to displace competition with regulation or monopoly public service."[22] A majority of the Court adopted the Lafayette standard in Community Communications Co. v. Boulder,[23] holding that a city is exempt from antitrust scrutiny only if its action "constitutes the action of the state . . . itself in its sovereign capacity . . . or unless it

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21 435 U.S. 389 (1978).

22 Id. at 413.

23 455 U.S. 40 (1982).

constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."[24]

The City's rent control regulations are in furtherance or implementation of clearly articulated and affirmatively expressed state policy, and thus come within the Parker exemption. New York's Local Emergency Housing Rent Control Act,[25] adopted in 1962, specifically states that the "legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York," and that "the transition from regulation to a normal market of free

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[24] Id. at 52.

[25] N.Y. Unconsol. Laws §§ 8601 - 8617 (McKinney 1974).

bargaining between landlord and tenant, while still the objective of state policy, must be administered with due regard for such emergency."[26] Accordingly, the Act gives New York City (and some other cities in the state) the authority to determine whether rent control is necessary, and to adopt and administer local laws or ordinances regarding the regulation and control of rents.[27]

Further, the Act specifically mandates that the City exempt housing accommodations it owns and operates from rent control. The Act provides that "no local law or ordinance shall hereafter provide for the regulation and control of residential rents . . . [in] any housing

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[26] Id. at § 8602.

[27] Id. at §§ 8603, 8605.

accommodations which are (1) presently exempt from such regulation and control. . . ."[28] At the time the Act was passed, "housing accommodations owned and operated by . . . the State of New York or any political subdivision thereof, or by a municipal or public authority" were exempt from rent control.[29]

Thus, New York has clearly and affirmatively expressed a policy that the City should control residential rents if it deems such control necessary, but that it should not subject its own properties to such regulations. The legislature "contemplated the kind of action com-

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28 Id. at § 8605.

29 N.Y. Unconsol. Laws §8582 (McKinney 1974). See also 9 NYCRR, Subtitle S, Chapter VII, Subchapter B § 2100.9.

plained of" by plaintiffs here.[30] Accordingly, under Lafayette and City of Boulder, the antitrust claims must be dismissed.[31]

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[30] Lafayette, supra note 21, at 415, 98 S.Ct. at 1138.

[31] City of Boulder, supra note 23, specifically left open the question of whether the challenged municipal action must meet an "active state supervision" test in addition to Boulder's "clearly articulated and affirmatively expressed state policy" test. Boulder, supra note 23, at 51 n. 14. The active state supervision test was applied by the Court in California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1979), a case involving private parties who claimed a state action exemption from the antitrust laws. The Second Circuit has not ruled on whether the active state supervision test is applicable to municipalities. See Capital Telephone Company, Inc. v. City of Schenectady, 560 F. Supp. 207 (N.D.N.Y. 1983). Other circuits have split on the issue. Compare Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983), Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3842 (U.S. May 24, 1983) (No. 82-1832), and Pueblo Aircraft Service,

THE IMPAIRMENT OF THE OBLIGATIONS OF CONTRACTS CLAIM

Plaintiffs charge that rent control and other housing regulations impair the obligation of contracts, in violation of article I, section 10 of the United

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Inc. v. City of Pueblo, Colorado, 679 F.2d 805 (10th Cir. 1982) (active state supervision test is not applicable to municipalities) with Corey v. Look, 641 F.2d 32 (1st Cir. 1981) (applying the active state supervision test to municipalities). See also Areeda, Antitrust Immunity for "State Action" after Lafayette, 95 Harv.L.Rev. 435, 445 n. 50 (1981).

The Court finds it unnecessary to decide whether active state supervision is necessary for municipal exemption from antitrust laws, because such supervision is present here. The need for continued rent control is an oft-addressed topic in the legislature, as is evidenced by the legislature's repeated extension of the expiration date of state rent control laws, and its recent amendments to the exemption from rent control for city-owned properties. See, e.g., Act of July 27, 1982, ch. 845, 1982 N.Y. Laws; Act of June 30, 1981, ch. 383, 1981 N.Y.Laws.

States Constitution. The claim is dismissed. It is well established that the City's rent control laws do not unconstitutionally impair contract rights.[32]

THE CLAIM OF UNLAWFUL REFUSAL TO REDEEM THE PROPERTIES

Under N.Y.C. Admin. Code § D17-25, former owners may apply to redeem properties which the City has foreclosed. If the former owner applies for redemption within four months of the City's acquisition of the property, and pays the outstanding taxes and other charges, redemption is mandatory. If the former owner applies for redemption after four months, but within two years, of the City's acquisition, redemption is at the discre-

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32 Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 198 (1921); Israel v. City Rent & Rehab. Admin. of City of New York, supra note 11.

tion of the City's Board of Estimate. Plaintiffs charge that the City has unlawfully refused to process their applications for redemption, which they filed on the last day of the two-year period.

According to the complaint, the city's refusal was based upon plaintiffs' failure to comply with a requirement that the title search submitted in support of a redemption application reflect the date the deed was recorded. Plaintiffs maintain that they were unable to comply with that requirement because of the manner in which the City indexes its records, and that the City's insistence on their compliance with the requirement was therefore a denial of due process. The facts alleged do not support a denial of due process claim. Because the City legally

foreclosed the properties, and the period for mandatory redemption had passed, plaintiffs' only "property" interest was in having the Board of Estimate follow its own rules and regulations regarding discretionary redemption.[33] Plaintiffs have not been deprived of that interest. Thus plaintiffs advance no substantial federal question. Their complaint seems to be that the City's refusal was an abuse of discretion and contrary to state law. The Court declines to exercise pendent jurisdiction over that claim, however, because all plaintiffs' federal claims are being dismissed before trial.[34]

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[33] See International House v. National Labor Relations Bd., 676 F.2d 906 (2d Cir. 1982).

[34] See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); McLearn v. Cowen

THE CONTRACT CLAIM

Plaintiffs claim that the City has breached an alleged settlement contract which they maintain obligates the City to reduce the tax asssessments on the properties and return title to the properties to plaintiffs. The City denies that the purported contract was ever consummated, and the parties differ as to the terms of the alleged agreement. Whatever the facts, the issue should be decided by the state courts, and this Court declines to exercise pendent jurisdiction.

THE DESTRUCTION OF PROPERTY WITHOUT NOTICE CLAIM

Finally, plaintiffs allege that the City destroyed a building on one of the properties without first giving notice to plaintiffs, and without good cause. De-

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& Co., 660 F.2d 845 (2d Cir. 1981).

molition of a building without notice to the owner may constitute a denial of due process.[35] However, plaintiffs were not the owners of the property in question when the building was destroyed in May, 1983 -- the City legally acquired title to the property on August 11, 1981.

Plaintiffs' federal claims are each dismissed for failure to state a claim for which relief can be granted. Plaintiffs' state law contract and abuse of discretion claims are dismissed because

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[35] See Burtnieks v. City of New York, 716 F 2d 982 (2d Cir. 1983).

the Court declines to assert pendent jurisdiction.

So ordered.

Dated: New York, N.Y.
September 23, 1983

/s/ EDWARD WEINFELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RENT CONTROL MEMORIAL CORP. and BRONTEL, LTD.,	:	
Plaintiffs,	:	
		82 Civ. 2664 (E.W.)
-against-	:	82 Civ. 2666 (E.W.)
THE CITY OF NEW YORK, PHILIP R. MICHAEL, As COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and TAX COMMISSION OF THE CITY OF NEW YORK,	:	PROPOSED AMENDED AND CONSOLIDATED COMPLAINT
Defendants.	:	

BRONTEL, LTD.,	:	
Plaintiffs,	:	
-against-	:	
THE CITY OF NEW YORK, PHILIP R. MICHAEL, As COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and TAX COMMISSION OF THE CITY OF NEW YORK,	:	
Defendants.	:	

Plaintiffs, by their attorney, MARTIN R. FINE, ESQ., allege:

PRELIMINARY STATEMENT

1. This is an action for injunctive and other equitable relief and for damages against the defendant, The City of New York, to redress violations of the Sherman Act, 15 U.S.C. Section 1 et seq. and other rights secured to plaintiffs by the Constitution of the United States and 42 U.S.C. Section 1983. Plaintiffs are the former owners of certain real property located in the City of New York, County of New York, Borough of Manhattan (hereinafter "the properties"). They seek a mandatory injunction, requiring the City to execute and redeliver deeds to plaintiffs-returning these properties to Rent Control Memorial Corp. or Brontel, Ltd. the rightful owners thereof; preliminary and injunctive relief en-

joining the City of New York (the "City") and the defendant City and City officials from transferring title to or possession of the properties below described during the pendency of these actions; and damages against the defendant City for its monopolistic actions and conduct restraining trade, unconstitutional seizure and confiscation and its numerous unlawful and unconstitutional acts and those of its agents as more fully set forth below.

JURISDICTION AND VENUE

2. (a) The jurisdiction of this Court is conferred by 28 U.S.C. Section 1343(3) to redress the deprivation, under color of state law, regulation, custom and usage, of rights, privileges and immunities secured to plaintiffs by the Constitution of the United States and by

28 U.S.C. Section 1331 because this case arises under the Constitution and Laws of the United States. More than the sum or value of $10,000 is in controversy, exclusive of interest and costs.

(b) Venue is proper under 28 U.S.C. Section 1391(b) because plaintiffs reside in the Southern District of New York, the claim arose and the property is located in this District, and upon information and belief, all defendants reside in this District.

THE PARTIES

3. At all relevant times, plaintiff, Brontel, Ltd. ("Brontel") was incorporated in the State of New York and was the former owner of the premises known as Block 1599, Lot 49 on the tax map of New York County (the"property"), known as 28 West 116th Street.

4. At all relevant times, plaintiff,

Rent Control Memorial Corp., ("Rent Control"), was incorporated in Oklahoma and was the owner of two apartment houses in New York City, locate at 415 East 12th Street, Manhattan, known as Block 440, 52 on the tax map of New York County; and Block 1621, Lot 65, located at 12 East 116th Street, New York.

5. The properties are improved with residential buildings which were subject to the provisions of the New York City Rent and Rehabilitation ("rent control") Law, Section Y51-1.0 et seq., of the Administrative Code of the City of New York ("Administrative Code") and the New York City Rent Stabilization Law ("rent stabilization"), Sections YY51-1.0.

6. Defendant Philip R. Michael is Commissioner of Finance of the City of New York (hereinafter "Finance Commissioner"). Pursuant to Section D17-12.0

of the Administrative Code, the judgment of foreclosure granted against the properties directed the Finance Commissioner to prepare, execute and cause to be recorded deeds conveying to the City full and complete title to the properties, which the City did.

7. Defendant Tax Commission of the City of New York (hereinafter "Tax Commission") is charged by the New York City Charter Section 153(b) with the duty of reviewing and correcting all assessments of real property for taxation within the City.

* * *

STATEMENT OF FACTS

(a) 415 East 12th Street, New York, N.Y.

11. Plaintiff's predecessor in interest purchased this property, known as Block 440, Lot 52, in or about July

1971.

12. As of December 1, 1971, the legally mandated rents to be paid plaintiff by tenants, under pain of severe criminal and civil penalties were as follows:

Apartment #	Rent
1	$ 44.92
2	80.96
3	59.85
4	63.40
5	110.00
6	67.60
7	125.00
8	68.07
9	61.41
10	125.00
11	105.00
12	135.00
13	57.32
14	57.32
15	73.20

13. The plaintiff was required by City law to maintain all required essential services, including heat, repairs and all other services, and to pay the enormous real estate taxes out of these nominal or token rents.

14. Notwithstanding the . . . rents which were mandated by the City, and upon which it was economically impossible to maintain the premises and to supply all the mandated essential services required by law, the City of New York over the next several years continually increased the so-called "legally mandated services" and required plaintiff to install and maintain evermore expensive maintenance and equipment, etc., without in any way providing for rent increases to pay for such equipment and maintenance.

15. And at the same time, for the year 1974/75, assessed the property at $28,000, which was a huge multiple of its actual fair market value for tax purposes. For each year since 1974/75 through 1977/78, the year 1978 being the year in which the City claims to have seized title to the property, the City

likewise assessed the property at a huge multiple of its actual fair market value as set forth herein:

Tax Year	Assessment
1974/75	$26,000.
1975/76	24,000.
1976/77	22,000.
1977/78	22,000.

16. In spite of the huge inflation and expenses including, but not limited to, the strangulating leap in oil costs for this and other buildings, and the huge inflationary increases in the cost of other goods and services, a more than doubling of the New York City tax rates, and enormous increases in so-called "legally mandated services" by the City of New York under pain of severe civil and criminal penalties, as of December 1977, the rents legally mandated by the strangulating web of New York City rules, laws

and regulations, remained as follows:

Apartment No.	1971 Rent	1977 Rent
1	$ 44.92	$44.92
2	80.96	75.00
3	59.85	59.85
4	63.40	125.00
5	110.00	100.00
6	67.60	67.60
7	125.00	147.00
8	68.07	100.00
9	61.41	55.27
10	125.00	135.00
11	105.00	80.00
12	135.00	125.00
13	57.32	51.54
14	57.32	51.54
15	73.20	125.00

17. The net result of course is that it was economically and legally impossible for the premises to be maintained by plaintiff without suffering huge operating losses every year, and after huge losses in 1977, the City of New York seized physical operation and control of the said premises. Thereafter, according to the City, in or about 1978, the City

seized legal title to the premises. During the entire period of time set forth hereinabove, the owners could not obtain any relief from the City and during said entire period of time, the City never tried one single tax certiorari "Inequality" case as hereinabove described, and the taxes remained huge and confiscatory and the rents remained nominal. . . .

415 East 12th Street, New York, N.Y.

	1972	1973
GROSS INCOME - as restricted by new York City	13,056	13,196
EXPENSES		
Payroll	290	498
Management	1,000	1,200
Fuel Oil	2,075	1,905
Electric & Gas	237	359
Interest & Amortization	3,572	3,572
Insurance	678	1,127
Repairs & Maintenance	3,026	6,666
Legal & Acc't.	1,638	1,000
EXPENSES TOTALS	8,944	12,755
NEW YORK CITY REAL ESTATE TAXES	2,093	2,007.92
Water & Sewer	566.56	566.56
TOTAL TAXES	2,659.56	2,574.48
TOTAL EXPENSES	15,175.56	18,901.48
NET GAIN - (LOSS)	(2,119.56)	(5,705.48)

415 East 12th Street, New York, N.Y.

1974	1975	1976
14,000	12,103	1,925
495	625	665
1,200	1,200	1,200
2,348	4,572	3,852
288	335	256
3,572	2,572	3,572
1,121	897	600
6,568	3,323	3,740
1,365	1,386	1,271
13,376	12,338	11,584
1,920.76	1,856.44	1,868.00
623.00	567.00	566.50
2,543.76	2,423.44	2,434.50
19,491.76	18,333.44	17,590.50
(5,491.76)	(6,230.44)	(15,665.50)

* * *

STATEMENT OF FACTS

(b) Re 28 West 116th Street, New York, N.Y.

20. Plaintiff, Brontel, Ltd., purchased this property, known as Block 1599, Lot 49, for a total purchase price of $900.00 in or about June we, 1975 from the City of New York at a public auction . . . .

21. Notwithstanding the foregoing, the City of New York assessed the property for the tax year 1975/76 for the sum of $11,500, which was 1,300% of its actual fair market value. For the tax year 1976/77, despite due and timely proceedings for each and every year by plaintiff, the assessment was continued at $11,500. Plaintiff duly filed tax certiorari petitions each year with the City tax Commission, protesting the out-

rageous assessments, pointing out that the property was vacant and untenanted and had a market value no greater than $900.00, the actual purchase price of said property. Notwithstanding the foregoing, the City continuously assessed the property at the confiscatory assessment of $11,500 for the next several years until 1978/79, now approximately 1,200% of the actual fair market value for tax purposes . . . .

22. Thus, plaintiff was left in a position of being assessed at a tax rate of more than 1,300% of the actual fair market value of the property, while all other property owners in the City were being assessed at a tax rate of approximately 20-25% of the actual fair market value of their properties.

23. In or about 1977, the City commenced foreclosure proceedings against

the property for real estate taxes. In such proceedings, the plaintiffs counterclaimed setting forth numerous defenses and answers to the foreclosure proceedings.

24. In procuring the opinion of the Honorable Martin Evans granting summary judgment of foreclosure to the City of New York and severing the counterclaims of these plaintiffs, the City of New York misrepresented to the Court and to these plaintiffs on numerous occasions that tax certiorari trials would be available in the "Fall of 1980." (see letter of Corporation Counsel dated February 8, 1979 annexed to Affirmation of Fine, Ex. E). In making such representations to these plaintiffs, and to the Court, the City of New York deliberately, willfully and purposely misrepresented to the New York State Supreme Court and later, in identi-

cal fashion, to the Federal District Court (Hon. Charles Brienat), and to the United States Court of Appeals for the Second Circuit, that the tax certiorari trials and the counterclaims would be tried either immediately or within a reasonable time thereafter . . . .

(c) Re 12 East 6th Street, New York, N.Y.

31. Plaintiff, Rent Control Memorial Corp., purchased this property, known as Block 1621, Lot 65, for a total price of $1,800.00 from the City of New York at a public auction . . . .

32. Notwithstanding the foregoing, the City of New York assessed the property for the tax year 1974/75 for the sum of $18,000, which was exactly ten times the purchase price. In the succeeding tax years, the assessments were as follows:

Year	Assessment	% of Fair Market Value For Tax Purposes
1975/76	$15,000.00	833%
1976/77	$15,000.00	833%
1977/78	$15,000.00	833%
1978/79	$11,500.00	639%

33. Notwithstanding the huge confiscatory overassessments by the City, as set forth hereinabove, the City fixed the legal rents to be paid by the 8 residential tenants of the property in amounts as set forth on the following chart:

12 East 116th Street

Apt. #	Rent
2E*	Free*
2W	$30.10 per month
3E	$38.67 " "
3W	$30.74 " "
4E	$41.67 " "
4W	$35.53 " "
5E	$68.95 " "
5W	$36.04 " "

*Superintendent required to live on premises pursuant to New York City law, and provide "essential services".

34. The plaintiff was required by

City law to maintain all required essential services, including heat, repairs and all other services, and pay the enormous real estate taxes hereinabove, out of these nominal or token rents.

35. It was impossible for the owner of the premises to increase the foregoing rents by any economically or legally feasible method.

36. As a result of the foregoing, the owners suffered huge losses of net income for all of the years at issue without any possibility, under City law, of relief, and the City seized physical operation and control of the premises on or about July 1976 . . . .

* * *

FIRST CLAIM FOR RELIEF

Plaintiffs repeat and reallege each and every allegation contained in

Paragraphs 1 through 37 as if more fully set forth herein.

38. At all relevant times, plaintiff Rent Control was the owner of two residential multiple dwellings located in New York City, at 415 East 12th Street and 12 East 116th Street, New York, New York.

39. The properties were occupied by tenants and rented subject to the provisions of the New York City Rent and Rehabilitation Law ("Rent Control") Section Y-51-1.0, et seq., of the Administrative Code of the City of New York ("Admin. Code") and the New York City Rent Stabilization Law ("Rent Stabilization"), Sections YY51-1.0, et seq.

40. Defendant City of New York through its various departments of Real Property, Housing, Preservation and Development, General Services, and other Divisions, controls, manages, sells,

leases and transfers real estate, both residential and commercial, throughout the City of New York.

41. The City spends more than one hundred million dollars per annum to operate and maintain residential real property that it has seized in rem within the past few years from the owners thereof; more than 75% of said funds are federal tax payers monies derived by the City of New York from United States government grants and programs. As a result of the foregoing, there is a substantial negative economic effect upon commerce within and among the states and foreign countries, within the meaning of the antitrust laws.

42. The relevant market in which the City engages in its real estate business is the City of New York.

43. Beginning four years prior to

the commencement of this action, the City engaged in conduct designed to, or which had the effect of, injuring the trade and business of plaintiffs, restraining trade and competition by fixing prices and artificially controlling prices, commerce, rentals, for the further purpose of depriving plaintiffs and other private property owners from their profits or gain. The aforementioned conduct by the City restrained trade and commerce within the meaning of Sections 1 and 3 of the Sherman Act, 15 U.S.C. Sections 1 and 3

44. Defendant City, pursuant to Admin. Code, Section D17-1.0, et seq., amended the statutory period for the foreclosure of property from three years after the date of the first arrearages to one year after said date.

45. Defendant City, while restricting rents private property owners may le-

gally charge tenants in multiple residential dwellings, specifically exempted itself from any regulation of rents in dwellings owned by the City. Admin. Code, Section Y51-3.0 (e); Section YY51-2.0.

46. The City has enacted onerous, burdensome and expensive local laws concerning the maintenance of residential buildings with which private owners must comply under threat of civil and criminal sanctions, but from which the City is exempt from compliance, as set forth in the following schedule:

PARTIAL LIST OF NEW YORK CITY AND STATE LEGAL REQUIREMENTS AND RESTRICTIONS ON MULTIPLE DWELLING OWNERS SINCE 1942 (Not Compensated by Any Rent Increases or Otherwise)

NEW YORK CITY RENT AND REHABILITATION (RENT CONTROL) LAW (Administrative Code of the City of New York Sec. Y51.1.0, et seq.)

(a) eliminates owners' constitution-

al right to bargain freely for fair market rents and negotiate arms-length lease agreements.

(b) prevents any rent increases without specific approval of the City;

(c) grants virtual lifetime tenancy to tenants and tenants' family including future family members without limit;

(d) requires substantial essential services to be provided under threat of forfeiture of rents and increases;

(e) provides criminal penalties up to two year's imprisonment for violations; and

(f) permits indefinite lease renewals by tenants at no increase in rent.

REAL PROPERTY LAW (Section 226-b, Chapter 549, Laws 1975)

Restricted owners' rights to prevent subleasing of apartments, mandates owners to accept any subtenant of the tenant's choosing, causing owner's subsequent loss of control over his buildings; allows tenant to profit enormously by charging subtenant rents that owner himself is forbidden to charge, under penalties of expulsion from Rent Stabilization Assoc., and limitation of rents to Rent Control levels.

REAL PROPERTY LAW (Section 235-b, Chapter 597, Laws 1975)

Enacted "warranty of habitability"

for all tenants, substantially increasing services required to be provided by owners under penalties of reduced rents, has been misconstrued by the Courts to cover every conceivable condition from squeaking floorboards to excessive noise made by passersby in the street, subjecting owners to virtual strict tort liability as insurers of the public weal, without permitting rent increases or pass-alongs of costs in any form.

RENT STABILIZATION LAW (Chapter 576, Laws 1974)

Repealed "vacancy decontrol" and made "decontrolled" apartments again subject to rent control; repealed rights of private landlords to bargain freely for free market rents; established Rent Guidelines Board to determine annual guidelines for rent adjustments, which Board has failed to consider economic conditions of the industry; allows City as municipal landlord total exemptions from the oppressive rent limitations private owners are subjected to; penalized owners the entire amount of miniscule increases allowed if they fail to maintain all services mandated by law, regardless of costs; penalizes owners up to three times the amount of any overcharge found by administrative agency unless owner affirmatively establishes he made a mistake; provides for abatements in rent for senior citizens who are recontrolled or stabilized tenants.

LOCAL LAW 17, Enacted 1974

Repealed provisions of "maximum base rent" laws that permitted labor cost "pass-alongs" to tenants and ordered land-

lords to repay any rent increased collected previously for increased labor costs.

LOCAL LAW 24, Enacted 1973

Limits increases in the Maximum Base Rent at Rent Controlled apartment to seven and one-half per cent per annum, regardless of whether the Maximum Collectible Rent figure or the owner's costs exceed this amount; prohibits owner from filing any application for increase in maximum rent for any year the owner has also instituted tax certiorari proceedings or for any year prior thereto; eliminates the incorporation of labor costs as an element of the formula for calculating maximum rent.

LOCAL LAW 17, Enacted 1973

Required installation by owners of new fire doors and frames, wire glass, and related equipment, sealing and glazing of transoms and other measures without any "pass-along" of costs of right of recovery from tenants.

LOCAL LAW 8, Enacted 1971

Additional heavy-duty lock sets, double bolts, latch sets, window grills at grade level and other equipment required to be installed by owners of old law tenements, without any "pass-along" of costs or right of recovery from tenants.

PUBLIC HEALTH LAW, TITLE X (Chapter 338, Laws 1970)

Requires removal or covering of all lead paint in apartments upon demand by health commissioner, and authorizes "receivership" of building to enforce compliance, but provides no mechanism for recovery of costs or lost rents by owners.

MULTIPLE DWELLING LAW (Chapter 496, Laws 1970 (Sec. 50-a-[3]))

Requires immediate installation of automatic self-locking doors and intercom systems, upon demand by tenants.

LOCAL LAW 71, Enacted 1968

Imposed new obligations on owners to install, repair and replace all sidewalks (City-owned property) adjacent or in vicinity of building under penalty of foreclosure by City if liens representing work are not paid immediately; requires owners of new property to indemnify the City for all claims or damages regarding injuries on sidewalks, under penalty of forfeiture of the owner's certificate of occupancy.

HOUSING MAINTENANCE CODE, 1967 (Title D, Chapter 26, Administrative Code of the City of New York, added by Local Law 56)

Added new obligations for private owners, including:

(a) installation of central heating systems and maintenance of heat on a twenty-four hour a day basis, regardless of cost, breakdowns, repair shutdowns, etc.;

(b) supplying of hot water to all dwelling units;

(c) installation of electric lights in all public halls and all rooms in dwelling units, and requirement of exterior lights in all public courts, area, stairs, halls, etc. between sunset and sunrise, irrespective of cost, vandalism, etc., and with no provision for pass-alongs;

(d) provision of constant janitorial services and numerous other requirements;

(e) painting of all building's interiors, must be painted every three years, and outside window sills every five years, whether needed or not, with no cost recovery to owners; fire escapes must be painted with two coats of contrasting colors, courts and shafts must be white;

(f) eradication of all rodents and insects, including bees, horseflies, tics, wasps, spiders, termites and mosquitos;

(g) maintenance of elevator mirrors, peepholes in entrance doors, mailboxes, floor signs, street numbers, sprinklers, basement access areas;

(h) imposition of civil and criminal penalties if any provision of law violated, including fines of $100.00 per day per violation, entry of judgment and docketing of liens against premises, imprisonment for up to one year, injunction and contempt proceedings.

LOCAL LAW 83, Enacted 1979

Requires building owners to clean substantial portions of public streets and roadways or suffer civil fines for inability to police premises around the clock, to keep public portions of walkways, curbstones, and City roadways free from all litter, debris or obstructions at all times. Selective and arbitrary enforcement of this statute has caused millions of dollars in fines to be levied against owners by the Department of Sanitation and enforced by Environmental Control Board.

47. By means of the aforementioned conduct, and other acts not presently known to plaintiff, the City has monopolized or attempted to monopolize the residential real estate market in the City of New York, in violation of the Sherman Act, 15 U.S.C., Section 2.

48. By reason of the aforementioned illegal conduct and violations of the anti-trust laws, plaintiff has suffered injury to its real estate business within the meaning of the Sherman Act.

49. Specifically, by reason of the City's illegal conduct, plaintiff has:

(a) been prevented from and continues to be prevented from profitably operating its buildings;

(b) lost and continues to lose profits which would have resulted from the ordinary operation of its business in a free market;

(c) sustained and continues to sustain losses in the value of its business and property;

(d) been driven into foreclosure by its inability to pay exorbitant and confiscatory taxes demanded by the City out of rents artificially and discriminatorily limited by the City's Rent Control; and

(e) incurred and continues to incur excessive costs and expenses which it would not have otherwise incurred but

for the City's misconduct.

50. Without the imposition by the City of its confiscatory tax assessments, onerous regulations and other restraints, plaintiffs' properties would have a fair market value as set forth above. At present, by reason of the City's monopolistic practices and interferences with commerce, their current value is zero. . . .

51. By reason of defendant's violation of the Anti-Trust Law, plaintiffs demand treble damages in an amount to be determined by the Court, as provided in the Clayton Act, Section 4, 15 U.S.C., Section 15, together with injunctive relief enjoining the City from disposing of the premises taken in rem from plaintiff in any manner whatsoever, committing waste thereat during pendency of this action, or committing further violations of the antitrust law.

SECOND CLAIM FOR RELIEF

52. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 52 of the Complaint as if more fully set forth herein.

53. Plaintiff, Brontel, Ltd. ("Brontel") was the owner of a vacant parcel located at 28 West 116th Street, known as Block 1599, Lot 49 on the tax maps of the City of New York.

54. By reason of the City's illegal conduct, oppressive Rent Control laws, discriminatory tax policies, monopoly practices and restraint of trade, and other violations of the Sherman Act, plaintiff was unable to develop its parcel or obtain financing to improve it, or rent it or comply with the City's burdensome regulations regarding its maintenance.

55. By reason of the City's viola-

tions of the Sherman Act, plaintiff Brontel's parcel decreased in value while the City's anti-competitive conduct caused its own properties to increase in value within the same relevant market area.

56. By reason of the City's violations of the Anti-Trust Law, Brontel was unable to pay the City's confiscatory and discriminatory taxes and the premises were taken by the City in rem on or about August 11, 1981.

57. The acts of defendant have injuriously affected plaintiff's business in the following manner:

(a) Plaintiff has been prevented from and continues to be prevented from profitably operating its property;

(b) Plaintiff has lost and continues to lose profits which would have resulted from the ordinary operation of

its business in a free market;

(c) Plaintiff has sustained and continues to sustain losses in the value of its business and property;

(d) Plaintiff has been driven into foreclosure by its inability to pay exorbitant and confiscatory taxes demanded by the City out of rents artificially and discriminatorily limited by the City's Rent Control; and

(e) Plaintiff has incurred and continues to incur excessive costs and expenses which it would not have otherwise incurred but for the City's misconduct.

58. By reason of defendant's violation of the Anti-Trust Law, plaintiff demands treble damages in an amount to be determined by the Court, as provided in the Clayton Act, Section 4, 15 U.S.C., Section 15, together with injunctive re-

lief enjoining the City from disposing of the premises taken in rem from plaintiff in any manner whatsoever, or committing waste thereat during pendency of this action.

* * *

EIGHTH CLAIM FOR RELIEF

* * *

91. On September 21, 1982, the City of New York and the Plaintiffs herein, and other plaintiffs not presently parties herein, entered into a settlement agreement relating to the other eight parcels owned by Friarton Estates Corp. and Sonia Equities Corp., which such corporations were the owners of these eight parcels and which parcels were originally included in the State Court proceedings together with the three parcels herein affected. Those settlement stipulations

with respect to the aforesaid eight parcels were part of a complicated and interrelated series of negotiations and discussions with the undersigned attorney for all plaintiffs, which culminated in a complex series of settlement documents; included among which were certain letter agreements executed by the City of New York, copies of which are annexed hereto as Exhibit "B" and "C", which provided that (a) the City would reduce all of the assessments for all unsettled tax years with respect to the three parcels herein affected to 50% of the assessed values and (b) that the City would support the application of the owners for the redemption of the parcels under the Administrative Code; said letter agreements state therein that they are "part of the Sonia/Friarton package."

92. Plaintiffs herein entered into

said agreements in good faith and in reliance upon the City's promise to reduce the said assessments by 50% and to recommend to the Board of Estimate "the approval of applications for redemption to the Department of General Services and the Board of Estimate".

93. In executing and delivering the settlement documents relating both to the eight parcels here not concerned and the three parcels herein concerned, plaintiffs herein relied upon the agreement ad promise of the City of New York contained in the said Exhibits "B" and "C", and acted in good faith in so doing. However, in so doing, the plaintiffs herein, and the plaintiffs Friarton and Sonia, acted under actual duress because of the unlawful and unconstitutional actions taken by the City of New York in violation of their constitutional rights out-

lined as follows:

(a) On or about June 7, 1982, the United States Court of Appeals for the Second Circuit reversed Judge Brieant's granting of a preliminary injunction against the City in [Friarton Estates Corp. v. City of New York, 525 F. Supp. 1250];

(b) The mandate of the United States Court of Appeals for the Second Circuit vacating the preliminary injunction that had been granted by Judge Brieant did not become effective until it was docketed in the office of the District Court which, by Court rule and regulation, could not be accomplished by the City of New York until June 28, 1982. This statutory period is, of course, in existence in order to permit litigants to seek and obtain any judicial relief dur-

ing the said twenty-one day period.*

(c) Nevertheless, in clear violation of the then-existing injunction granted by Judge Brieant, on or about June 8, 1982, the City purportedly did execute and deliver unto itself a deed for the eight Friarton/Sonia properties.

94. This deed, however, was secreted and not recorded, and its existence was kept a secret by the City until on or about July 17, 1982. On June 25, 1982, acting within the statutory twenty-one day period during which the preliminary injunction remained in effect, Friarton Estates Corp. filed a petition under Chapter XI of the United States Bankruptcy Code and thereupon obtained an automatic stay of the City's enforcement of judgment.

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*Rule 4, Federal Rules of Appellate Procedure

95. Thereafter, the City revealed the existence, on or about July 17, 1982, of the purported deed of June 8, 1982, which was made in flagrant violation of the existing injunction of Judge Brieant, and the injunction which was in full force and effect until the United States Court of Appeals mandate had been entered, which was not done until July 1, 1982.

96. Acting under the duress caused by the unlawful and unconstitutional taking of the properties seized by the City in violation of the District Court injunction, the parties, in accordance with a most interesting and unusual "suggestion" in the Court of Appeals decision dated June 7, 1982, did enter into the settlement agreements above described, which have been consummated for the eight parcels owned by Friarton and Sonia.

97. In accordance therewith, the related Friarton/Sonia plaintiffs paid very substantial sums to the City and entered into agreements which called for installment payments to the City of almost $1 million, and to agree to an almost immediate ex parte foreclosure proceeding in the event of a default in these installment demands or the payment of current taxes for a long period. The City, therefore, received large consideration and has received the payment of almost $200,000 already as a result of these agreements.

98. Nevertheless, the City of New York is now attempting to unilaterally repudiate their agreements with respect to these three parcels unless the plaintiffs herein agree to numerous additional waivers of their constitutional rights, including dropping all their claims with

respect to the premises known as 415 East 12th Street, New York, N.Y.

99. The agreement between the City and the Plaintiffs herein . . . is a legally enforceable agreement entered into in the fact of federal court litigation then challenging the unlawful and unconstitutional seizure by the City of the aforesaid properties in violation of both the Federal District Court injunction (Judge Brieant) which was still in force and effect, and the automatic stay provisions of the United States Bankruptcy Code.

100. To permit the City to unilaterally renege upon its agreement to settle these three cases, after having successfully extracted the agreement and the consummation of the settlement agreements "as part of the Friarton/Sonia package" would be (a) to deny these plaintiffs due

process; (b) to impair the obligation of the contract that was entered into by the City by its own unilateral declaration; and (c) would permit unjust enrichment to the City and (d) cause substantial prejudice and damage to these plaintiffs, by the loss of their real estate.

101. Plaintiffs herein only agreed to the settlements herein sought to be enforced because of the unconstitutional takings that had already been accomplished by the City by its violation of two extant Federal Court stays, and solely because of the economic duress attendant thereto because of the City's actual seizure of operations and control of the eight Friarton/Sonia parcels.

102. The plaintiffs herein are ready, willing and able to consummate the agreements of settlement as set forth in the letters of September 21, 1982, and

the City of New York unilaterally refuses to do so; this Court should order, therefore, specific enforcement of the agreements of settlement to prevent irreparable injury to these plaintiffs, and to prevent unjust enrichment in favor of the City and to prevent the City from profiting from its own wrongdoing, and its imposition of unilateral and unconstitutional conditions upon the plaintiffs herein.

103. On this cause of action, the plaintiffs herein are entitled to an Order compelling specific performance of the aforesaid agreements of settlement and damages including legal fees and the

costs and expenses of this litigation in an amount to be determined by this Court.

* * *

MARTIN R. FINE, ESQ.
Attorney for Plaintiffs
644 Broadway
New York, New York 10012
(212) 477-1155

New York, New York
August 15, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - -x

RENT CONTROL
MEMORIAL CORP.,
and BRONTEL, LTD.,

Plaintiffs,

-against-

82 Civ. 2664 (E.W.)
82 Civ. 2666 (E.W.)

THE CITY OF NEW YORK, et al,

REPLY AFFIRMATION

Defendants.

- - - - - - - - - - -x

BRONTEL, LTD.,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al,

Defendants.

- - - - - - - - - - -x

MARTIN R. FINE, having duly affirmed pursuant to 28 U.S.C. 1746, states the following under penalty of perjury:

1. I am counsel to plaintiffs herein and am fully and personally familiar with the facts and circumstances of the above captioned proceedings. This affirmation is submitted in reply to tne Affirmation of Stephen Resnick, Esq., dated August 23, 1983. ("Resnick Affirmation")

* * *

4. In ten of fifty-nine of the City's Community Districts, sixty-five (65) per cent of all residential housing units have already vested in the City through its In Rem proceedings. For instance, In community District 3, ninety-five (95) per cent of all housing units were either in rem or three-quarters or more in tax arrears. N.Y.C. Department of Housing, Preservation and Development, "The In Rem Housing Program," First Annual Report, September 1978

to 1979, published October 1979. In 1978, HPD managed dwelling units numbering 120,000, in the 9,000 buildings it had by then seized In Rem. City of New York, Mayor's Management Report, p.55 (1978).

5. As of the first quarter of 1981, the City's in rem "inventory" totalled nearly 112,000 residential units that had already been seized by the City. More than 17,500 apartments were demolished by the City during this time; 9,743 were condemned, 41,434 were burned or boarded up; and other losses totalled 1,680. Michael Stegman, "Dynamics of Rental Housing In New York City, pps 209-209, February 1982 Report (HPD).

6. The Mayor's Annual Plan for Fiscal Year 1983 admits to current management of 10,848 in rem buildings containing 83,712 units, as well as ownership of

5,015 vacant buildings seized *in rem*, containing approximately 50,000 units. New York City Mayor's Management Report at page 216 (January 1983).

7. The total number of apartments that the City has destroyed by its anti-comptetitive, self-destructive actions is more than 500,000 residential units in the past 15 years -- or approximately one-third of all rental apartments in the City. In addition, there are currently 45,000 privately owned properties in the City, containing 550,000 units, which are more than three quarters in tax arrears and whch would greatly increase the size of the City's seizures and monopolization of rental housing. HPD Report, *supra*.

8. In addition, the City currently owns 2,792 public housing project buildings containing approximately 200,000 dwelling units. New York City Mayor's

Management Report, at 239 (1983). The City collects more than $200 per month, per average apartment, while plaintiffs herein were limited to such paltry sums as $44.92 and $51.54. See also, Amended Complaint at 7, 9. This excludes payment of taxes and debt service, which private owners must subtract from their already meager budgets. The total City Revenue in Rental Housing is approximately $801.8 million per year.

9. The total supply of residential rental units throughout the City currently amounts to approximately 1.4 million, a reduction from the 1.9 million units extant in 1973, when the City began its campaign of monopolization. The City's ownership and control of over 500,000 apartments makes its relevant market share in excess of 35 per cent of all rental apartments in the City. Since

1973, the City's share of housing has increased dramatically from approximately ten per cent of rental units to its current 35 per cent. These facts clearly demonstrate the City's burgeoning real estate business affects interstate commerce within the meaning of the Sherman Act, unfairly competes with private property owners in this City; and [illegible] clearly monopolization and attempted monopolization.

10. All sectors of the public suffer when the City is permitted to maintain such monopolistic practices. Not only are smaller owners, such as plaintiffs, driven out of business, but banks with large mortgage portfolios lose millions of dollars in loan proceeds when owners are forced to abandon properties. Renters suffer when fewer and fewer apartments are available to occupy and the

quality of housing stock constantly declines in the absence of revenues to make repairs.

11. From 1960 to 1965, total rental housing units increased from 2.15 million to 2.14 million units. Walsh and Altman, "Rent Control and the Rental Housing Market in New York City, 1968", Department of Rent Report (January 1970). By 1975, rental units declined to 1.99 million, while losses accelerated thereafter.

12. For the "first time in its recent history", Queens County suffered a net decline in units between 1975 and 1978, while losses in the Bronx were catastrophic and more than three times the City's rate as a whole. More units were lost there during this three year period than in the ten years preceding 1975, over 79,000 apartments. Pete

Marcuse, "Rental Housing in the City of New York", (1979). The City itself has admitted that:

> "Housing construction and supply needs and conditions have fluctuated sharply though the years in the City. However, the problems of property deterioration, sharply rising maintenance costs and abandonment which jeopardize shelter for large groups of people, have rarely been so dramatic as today. A recent study estimates there are over one million units in New York in need of substantial rehabilitation. Dilapidation of rental units rose by 123% from 1960 to 1970. financing new construction is virtually impossible except for luxury units. Federal assistance is the primary source of funds for rehabilitation, of mortgage insurance to guarantee the private loans still available, and of grants for housing for the elderly."

Department of City Planning, "Managing Land Use in New York City, p. 30 (1977 Report).

* * *

/s/ Martin R. Fine
MARTIN R. FINE

Dated: New York, N.Y.
August 31, 1983

SUPREME COURT OF THE UNITED STATES

No. A-236

FRIARTON ESTATES CORPORATION, ET AL.

v.

CITY OF NEW YORK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 4, 1982.

/s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 7th day
of September, 1982

Office-Supreme Court, U.S.
FILED
SEP 12 1984
ALEXANDER L. STEVAS
CLERK

No. 84-101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BRONTEL, LTD., et al.,

Petitioners,

vs.

THE CITY OF NEW YORK, et. al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 11, 1984

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32 pp

QUESTION PRESENTED

Whether the District Court properly dismissed, and the Court of Appeals properly affirmed dismissal of the complaint which alleges, inter alia, that (1) New York City's Rent Control Laws violate the Sherman Antitrust Act, 15 USC §1 et seq., and (2) New York City breached a proposed settlement contract.

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No. 84-101

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

A. History of the Proceedings Below

In 1975 and 1976, petitioners acquired three New York City properties which have been the subject of litigation in the state and federal courts

since 1977. During the entire period of litigation petitioners have not paid any of the taxes assessed on those properties (7-a).*

Petitioners' original complaints in this federal action alleging violations of the United States Constitution and 42 USC §1983, were filed on April 26, 1982 (JA7-20). Respondents' time to answer was extended by stipulation "so ordered" by Judge Weinfeld, until after the Second Circuit rendered a decision in the related case of Friarton Estates Corp. .. City of New York, 681 F2d 150 (1982).** Following Friarton, respondents moved pursuant to Fed. R. Civ. P. 12(b)(6) and 56 to dismiss the action for failure to state a claim and on grounds of res judicata and collateral estoppel (JA43-44).

*Unless otherwise indicated, numbers in parentheses followed by "-a" are references to the Appendix to the Petition for Certiorari; numbers in parentheses preceded by "JA" are references to the Joint Appendix filed in the Circuit Court.

**The Friarton decision is discussed infra in the context of the District Court's decision in this action.

Thereafter, the actions were discontinued by a "so ordered" stipulation pending settlement discussions (JA47-48).

On September 21, 1982, respondents wrote to petitioners concerning the proposed settlement (JA231-232). The letter, which incorporated the understandings of the parties, stated that petitioners must withdraw the pending federal actions, with prejudice, in exchange for, inter alia, respondents' counsel's recommendation to the Board of Estimate to approve petitioners' applications for redemption of the subject properties (JA231, 235-236), which due to petitioners' continued failure to pay any assessed taxes, (not even the amount due based upon their own estimate of the fair valuation of the properties), had been seized in in rem foreclosure proceedings.* Petitioners never accepted respondents' terms of settlement (JA236).

*One property had been demolished pursuant to a New York State Supreme Court order (JA201-203).

Upon failure of settlement efforts, petitioners moved to restore the actions to the calendar and to amend the complaints pursuant to Fed. R. Civ. P. 15 (JA49). The motion was granted on consent by orders dated April 5, 1983 (JA106-7). Respondents then renewed their motions to dismiss (JA108-112). Thereupon petitioners cross-moved in August, 1983 to file an amended and consolidated complaint and for a preliminary injunction* against the City to prohibit respondents from taking any further action regarding the properties and to compel respondents to process petitioners' applications to redeem its properties (JA113-115). The amended complaint alleged in addition to violations of Section 1983, breach of the Sherman Act, 15 USC §1 et seq., impairment of the obligations of contract, unlawful refusal to permit redemption of properties, breach of an alleged settlement contract and tortious

*After oral argument on the preliminary injunction motion, Judge Weinfeld denied the motion as "utterly lacking in substance" (JA262).

destruction of property (JA140-165). The City opposed the cross-motion to amend on all grounds and reiterated that the complaint should be dismissed pursuant to R. 12(b)(6).

By decision dated September 23, 1983, Judge Weinfeld of the United States District Court for the Southern District dismissed plaintiffs' federal claims for failure to state a claim and dismissed the "state law, contract and abuse of discretion claims" upon declining to exercise pendent jurisdiction (7-a - 37-a). The United States Court of Appeals for the Second Circuit affirmed the District Court judgment on April 13, 1984 (1-a - 4-a).

B. Decisions Below*

Preparatory to discussing the effect of res judicata, the District Court reviewed the "long and convoluted" prior state and federal court litigation

*The District Court opinion is reported at 571 F Supp 1065 (S.D.N.Y., 1983) and is reproduced in the Appendix to the Petition starting at page 7-a.

of petitioners (12-a). The state action began in 1977 when the City moved to foreclose on all tax delinquent properties including that belonging to petitioners. Petitioners denied that they had failed to pay any "lawfully assessed" taxes and asserted in counterclaims that the City's rent control laws amounted to an unconstitutional taking without just compensation and that the properties could not be foreclosed pending a determination of the legality of the assessment in tax certiorari proceedings. Petitioners' properties were severed from the main in rem action and petitioners' joined with Friarton Estates and others in seeking to consolidate the foreclosure action with the tax certiorari actions. In August, 1979, Justice Martin Evans partially granted petitioners' motion to amend the answer.

The answers as amended retained the counterclaim charging that the City's rent control laws were unconstitutional, and alleged as an affirmative defense that it would be inequitable to foreclose the properties while tax certiorari proceedings were pending, and a denial of due

process to allow the City to proceed with its in rem foreclosure actions absent a consolidation of their pending certiorari proceedings. Ultimately, Justice Evans denied consolidation of the foreclosure and certiorari actions, severed petitioners' counterclaim regarding constitutionality of rent control, and granted the City's motion for summary judgment on the foreclosure actions (14-a - 15-a).

Petitioners and Friarton appealed to the Appellate Division, which affirmed without opinion [79 AD2d 899 (1980)], and further appealed to the Court of Appeals, which dismissed the appeal for lack of a "substantial constitutional question [53 NY2d 795 (1981)] (17-a). A petition to this Court for a writ of certiorari was denied [454 US 837 (1981)] (18-a).

Judge Weinfeld then summarized the prior federal court litigation as follows (18-a - 20-a):

> Friarton then filed an action in the Southern District of New York with respect to the eight properties it had owned. It sought an injunction against enforcement of

> the foreclosure judgments until the state tax certiorari proceedings had been concluded, and damages for alleged violations of its constitutional rights. The District Court granted a preliminary injunction; [footnote omitted] the Second Circuit reversed, holding that Friarton's constitutional claims were barred by the res judicata effect of the state court proceedings [footnote omitted].
>
> In April, 1982, after argument of the appeal, but before the Court of Appeals handed down its decision, plaintiffs, who had not joined the Friarton action, brought this action, seeking the same relief Friarton had sought. When the City moved to dismiss plaintiffs' initial complaint in this action, plaintiffs applied for and were granted leave to serve an amended complaint, which contained antitrust, takings, tort and contract claims.

Turning to the City's res judicata defense, Judge Weinfeld determined that regardless of whether petitioners characterize their claims as "inverse condemnation" or taking without just compensation, their argument that the City unconstitutionally foreclosed upon their properties without affording them an adequate opportunity to

challenge the tax assessments "were presented to, and passed upon by, the New York State trial and appellate courts" (20-a -21-a). Quoting Judge Friendly's statement in Friarton, that the record in the state court litigation in which petitioners were parties " 'leaves no room for doubt that the claims of lack of due process and taking of property without just compensation were fully presented to the New York courts, and that those courts entertained them but denied them on the merits' ", Judge Weinfeld reached the same conclusion and dismissed those claims as barred by res judicata (20-a - 25-a).

Turning to petitioners' antitrust claims,* the Court found that under the rule articulated in Parker v. Brown, 317 US 341 (1943) and developed in

*Judge Weinfeld chose to dismiss the antitrust claim on the merits, while recognizing that there might be "some substance" to the City's contention that this claim was barred by the collateral estoppel effect of the Friarton federal litigation since petitioners "assumed control over" this litigation (citing Montana v. United States, 440 US 147 [1979]).

Lafayette v. Louisiana Power and Light Co., 435 US 389 (1978) and Community Communications Co. v. Boulder, 455 US 40 (1982), the City's control of residential rents was exempt from antitrust considerations, holding (28-a - 29-a):

> The City's rent control regulations are in furtherance or implementation of clearly articulated and affirmatively expressed state policy, and thus come within the Parker exemption. New York's Local Emergency Housing Rent Control Act, adopted in 1962, specifically states that the "legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the State of New York," and that "the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state policy, must be administered with due regard for such emergency". Accordingly, that Act gives New York City (and some other cities in the state) the authority to determine whether rent control is necessary, and to adopt and administer local laws or ordinances regarding the regulation and control of rents [footnote omitted].

In addition, the Court recognized that the Rent Control Act exempted City owned or operated

housing from its regulations. Thus, the City's rent control program which is subject to active state supervision as "evidenced by the legislature's repeated extension of the expiration date of state rent control laws" is absolutely exempt from antitrust challenge.

Next, the Court dismissed petitioners' charge that rent control and other regulations impair the obligation of contracts, finding that the constitutionality of such regulations was "well established" (33-a).

Regarding the remaining state law claims, the Court declined to exercise pendent jurisdiction. At most, the Court held that petitioners' claims amount to allegations of abuse of discretion by the Board of Estimate in refusing to consider their applications for redemption of their property and a breach of an alleged settlement agreement. Whatever the facts, the Court stated, those issues were more properly for state courts to decide, and in the exercise of discretion declined to exercise pendent jurisdiction (36-a).

Lastly, the Court rejected petitioners' tort claim for wrongful destruction of their building in May, 1983 because, the Court held, the City had owned the building since August, 1981 (37-a).

The United States Court of Appeals for the Second Circuit affirmed the District Court judgment, "substantially for the reasons given in the district court's opinion" (3-a).

REASONS FOR DENYING THE WRIT

PETITIONERS HAVE FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IN THIS MATTER.

Petitioners seek this Court's review on the ground that the Courts below granted the City "absolute immunity" from the Sherman Antitrust Act, and argue that, accordingly, the lower Courts' decisions are in conflict with the holdings of other circuits regarding state action immunity. However, petitioners misread the lower Courts' decision

which, as set forth infra, are in complete accordance with this Court's holdings on state action immunity. Thus, the purported conflict simply does not exist. Moreover, it is submitted that even if the findings of the Courts below were improper, petitioners have failed to raise any issue which warrants review by this Court.

A. The City's Rent Control Regulations Are Implemented Pursuant to an Explicit Oft Repeated State Policy to Control Residential Rents. Therefore, the City's Actions Fall within the State Action Exemption to the Antitrust Laws.

1. State Action Immunity was properly fround.

Petitioners' argument to this Court speculates, at length, as to the purported effects the City's Rent Control Regulations will have on the rental housing market in the City. Such speculation is presented, however, to obfuscate petitioners' fundamental problem throughout this litigation, that the City's Rent Control Regulations implement a "clearly articulated and affirmatively expressed

state policy," which pursuant to this Court's holding in Parker v. Brown, 317 US 341 (1943) exempt those regulations from the federal antitrust laws.

That such exemption was appropriately granted in this case is illustrated by the fact that not only is the City's action in response to a "clearly articulated and affirmatively expressed state policy", but it is also now subject to "active state supervision." Thus, under any reading of this Court's holdings concerning antitrust exemptions, petitioners' claim that the City's rent control program is illegal must fail.

The Local Emergency Housing Rent Control Act of 1962 (McKinney's Unconsolidated Laws, Section 8601 et seq.) authorized the City of New York to determine whether rent control should continue in the City and further provided that rent control regulation should be exercised by the City of New York. Since 1962, the City of New York has enacted legislation to continue rent control, now

codified as Title Y, Section Y51-1.0 et seq., of the Administrative Code of the City of New York.*

*The New York City Rent Control Law has most recently been upheld in Benson v. Beame, 50 NY2d 994 (1980) app. den. 449 US 1119 (1981).

The New York Court of Appeals stated:

> Plaintiffs attack the New York City Rent Control Law on the grounds that there is no longer any emergency after 36 years, that as applied it is confiscatory, and that in any event there has been such a failure of administration of the law as to mandate its being declared unconstitutional. The need for rent control has been re-examined legislatively at intervals of three years, the most recent such review being the March 27, 1980 Report of the New York State Temporary Commission on Rental Housing, which concluded that "There is a need for continuing a form of rent regulation in those jurisdictions in which housing accommodations are presently subject to rent control or rent stabilization." Whether there is need for controls is a matter of legislative determination in the first instance. The presumption of a factual basis for that determination is not overcome by

(Footnote continued on next page)

The State and City of New York have determined that a public housing emergency exists, which requires the enactment of comprehensive statutory and regulatory methods for regulation of residential rents in New York City. As set forth at section 8602 of the Unconsolidated Laws of the State of New York (Local Emergency Housing Rent Control Act):

> The legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the State of New York which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local

---

(Footnote continued from previous page)

> mere passage of time, nor have plaintiffs, whose affidavits concentrate on the effect of controls on property owners, presented evidence to demonstrate beyond a reasonable doubt that there is no factual basis. 50 NY2d at 995, 996.

> government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the legislature continues to be imperative; . . .

Moreover, as the District Court further found, section 8605 of the Act mandates that City owned and operated housing is exempt from rent control. These statutory provisions definitively establish that "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." Lafayette v. Louisiana Power & Light Co., 435 US 389, 415 (1978). Further, even employing the standard as refined in Community Communications Co. v. Boulder, 455 US 40 (1982), that the municipal action is exempt from antitrust scrutiny only if it is "the action of the State ... itself in its sovereign

capacity" (Id. at 52), and assuming that the open question in Boulder, "whether active state supervision is necessary for municipal exemption" is answered affirmatively, the District Court properly determined that the municipal activity was absolutely immune. The New York State Legislature's repeated extensions of the expiration date of the rent control laws establish that such controls are state policy. See, Act of July 27, 1982, Ch. 845, N.Y. Laws.

Most recently, the 1983 Emergency Tenant Protection Act, signed into law on June 30, 1983, provided for the administration of Rent Control to be assumed by the State as of April 1, 1984. A fortiori, the administration of rent control by the City falls within the Parker "state action" immunity from coverage by the Antitrust Law and a complaint based on this statute was properly dismissed pursuant to Rule 12(b)(6).

Furthermore, the distinction petitioners attempt to draw based upon the contention that in regulating rents, the City is acting in a proprietary

function and not a traditional governmental function (see Petition, pages 20-24), totally lacks merit. It is clear from the decisions below that the City was not given a "per se" exemption, which is what triggered the Chief Justice's concern in City of Lafayette v. Louisiana Power and Light Co., 435 US at 422, when he drew such a distinction in his concurring opinion. Here, where the state policy regarding rent control is clearly articulated and the State has assumed control over administration of Rent Control, an exemption from the federal antitrust laws is clear.

2. The lower Courts' decisions do not conflict with those of other circuits.

Contrary to petitioners' argument, none of the cases cited in their petition are in conflict with the lower Courts' decisions, nor do the cited cases rely upon the proprietary/governmental distinction for the purpose of finding the challenged municipal action subject to the federal antitrust laws. Indeed, the cases cited by petitioners rely upon the more authoritative reasoning that the challenged actions

were not pursuant to a "clearly articulated and affirmatively expressed state policy," nor was there any indication of "active state supervision."* As shown supra at pages 13 through 18, the challenged action here is clearly pursuant to the expressed state policy of the need for regulation of the rental housing market in New York City, and, in fact, that regulation is now administered by New York State. Thus, the purported conflict simply does not exist; petitioners have failed to present any persuasive authority supporting their position that the Rent Control program is not entitled to state action immunity from the federal antitrust laws.

*Indeed, in Parks v. Watson, 716 F2d 646, 663-664 (9th Cir., 1983), the Court denied immunity on the ground that although the State's legislation allowed the municipality to establish its own geothermal district, it did not provide that the municipality could regulate or exclude privately owned districts, and found no such implication in the legislation. Similarly, an exemption was denied in Carey v. Cook, 641 F2d 32, 37 (1st Cir., 1981), because the Court found no explicit or implicit intention, in legislation which gives the public authority power to license new entrants to the ferry market, to allow the authority or town to regulate the parking lot market.

B. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO EXERCISE PENDENT JURISDICTION OVER THE SPECIOUS BREACH OF CONTRACT CLAIM.

In United Mine Workers v. Gibbs, 383 US 715, 726 (1966), this Court advised that "if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claims should be dismissed as well." Here, having determined that petitioners' main claims were barred by res judicata and after dismissing their antitrust allegation pursuant to Rule 12(b)(6), the District Court had no reason to consider claims which raised only state law issues. On the contrary, to have exercised jurisdiction might be considered an abuse of discretion. Nolan v. Meyer, 520 F2d 1276, 1280 (2d Cir., 1975), cert. den., 423 US 1034.

Petitioners, who do not even refer to a signed settlement agreement, argue that by refusing to exercise pendent jurisdiction, "the courts below limited the scope of jurisdiction under 28 U.S.C. §1331 in a way that could result in inhibiting

settlements and their effectuation in federal litigation" (Petition, p. 33), and further argue that this result of the lower Courts' holdings conflicts with rulings in other circuits. However, none of the cases cited in their petition at pages 33-35 support their argument; indeed, the decision in Fairfax Countywide Citizens' Association v. Fairfax County, 571 F2d 1299, 1303 (4th Cir.,), cert. den., 439 US 1047 (1978) contradicts petitioners' argument and holds that the district court is not empowered to enforce a settlement agreement "unless the agreement had been approved and incorporated into an order of the court, or at the time the court is requested to enforce agreement, there exists some independent ground upon which to base federal jurisdiction." Here, no such predicate exists. Thus, declining jurisdiction was an appropriate exercise of the District Court's discretion. In conclusion, petitioners have simply failed to raise an issue which merits review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

September 11, 1984.

Respectfully submitted,

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No. 84-101

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OCTOBER TERM, 1984

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vs.

THE CITY OF NEW YORK, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Summary

Corporation Counsel seeks to sidestep the issues raised by the Petition in two principal ways:

1. Most amazingly, Corporation Counsel seems to deny (CC 21; CC i)[1] the existence of the signed written settlement executed on Corporation Counsel's own stationery by an Assistant Corporation Counsel, made part of the record below (JA 167-168), and announced in open Court by Corporation Counsel itself (JA 219) as set forth in the Petition at 33 and never denied by Corporation Counsel.

The signed settlement, set forth in the supplemental appendix to this reply brief (1 ra), deals directly with the resolution of the federal claims raised by the complaint below, by calling for

---

[1] References to Corporation Counsel's brief in opposition to the Petition are in the form "CC--," to the Joint Appendix below in the form "JA--," to the supplemental appendix to this reply in the form "--ra," and to the appendix to the original Petition in the form "--a." For statement as to parties under Rule 28.1 of the Rules of this Court, see Petition at III-IV.

dismissal of the case in exchange for procedures for redemption of the real estate taken from its owners by the City's illegal conduct.

2. Corporation Counsel erroneously treats the question raised in the Petition concerning the propriety of finding absolute antitrust immunity prior to trial for alleged anticompetitive abuse of the Defendants' combined regulatory and proprietary functions as an attack on the facial validity of rent control. Thus in its statement of the questions presented (CC i) Corporation Counsel says that the first issue involves whether "New York City's Rent Control Laws violate the Sherman Antitrust Act..."

By stark contrast, the Petition seeks to question the permissibility under federal law of the way the Defendants

used the totality of their powers and proprietary activities to enhance their market position by first destroying the economic viability of -- and then taking, the real estate involved in the Petition.

The complaint below alleged that the totality of these Defendants' actions made it impossible to pay the City's own taxes (44a-57a), a circumstance now relied on by the Corporation Counsel to foreclose review of that very conduct (CC 2). Rent control as such is not challenged or in issue here.

Contrary to Corporation Counsel's assumption (CC 18), subsequent State takeover of City rent controls does not legitimize prior abuses. Indeed, it more likely indicates State dissatisfaction with those abuses. Contrary to Corporation Counsel's implication, subsequent state takeover should hardly

insulate the City from appropriate equitable relief such as divestiture of the properties involved here if a violation were found after trial.

POINT I

Contrary to Corporation Counsel's Claim, A Written Settlement Agreement Relating to Petitioners' Federal Claims Was Executed, and Repudiated by the City.

Corporation Counsel's brief states that:

"Petitioners...do not even refer to a signed settlement agreement..." (CC 21).

In fact, the Petition set forth in its Appendix at 74a that the settlement described in the text of the Petition at

14 was in the form of two letter agreements attached to the complaint below as Exhibits B and C (JA 167-168).

Exhibit C to the complaint is a letter signed by Judah Dick, Assistant Corporation Counsel on Corporation Counsel stationary dated September 21, 1982, and reproduced in the supplemental appendix to this reply at page 1 ra. It begins with the following words:

"This will confirm our understanding relative to the above-captioned actions."

Corporation Counsel also does not deny that, as set forth in the Petition at 33, Corporation Counsel announced settlement of the case in open federal Court on October 19, 1982 (JA 219).

Based on this announcement, "the attorneys for all parties having appeared and advised the Court that all claims asserted herein have been settled," the

District Court that day ordered the action discontinued (JA 47, 3 ra). Corporation Counsel's suggestion (CC 3) that some further acceptance was required is thus without the slightest basis.[2]

This signed, written settlement announced to the District Court (1 ra) deals directly with the issues raised in the Fourteenth Amendment and Sherman Act claims of the complaint below, by permitting petitioners to redeem the properties alleged to have been lost as a result of the City's illegal conduct. Divestiture is, of course, a common antitrust remedy. United States v. E.I. duPont de Nemours & Co., 366 U.S. 316 (1961); Schine Chain Theatres v. United States, 334 U.S. 110 (1948). Indeed, an antitrust court has discretion to fashion

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[2]Defendants have accepted and retained substantial payments in consideration of these agreements (79a).

any remedy reasonably related to the alleged violation. National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

Corporation Counsel's reliance on Fairfax Countywide Citizens Ass'n v. Fairfax County, 571 F.2d 1299 (4th Cir), cert. denied 439 U.S. 1047 (1978) as supporting lack of original District Court jurisdiction to enforce a settlement of a federal case by means unrelated to the federal claims (CC 22) is thus factually as well as legally misplaced. Indeed, the Fairfax Court stated that when, as here, "the settlement agreement resolved the dispute giving rise to the original litigation over which the district court had jurisdiction, any dispute involving the agreement itself was likewise properly before the court." 571 F.2d at 1304.

Moreover a subsequent Fourth Circuit decision cited in the Petition at 34 but not discussed by Corporation Counsel emphatically asserts jurisdiction to enforce settlements of federal litigation generally. Gamewell Mfg. v. HVAC Supply, 715 F.2d 112, 115 (4th Cir. 1983).

Corporation Counsel does not question that courts in other Circuits have repeatedly held that the district courts have jurisdiction under 28 U.S.C. § 1331 to enforce settlements arrived at to deal with federal claims, even where the settlement goes beyond what may be required to remedy the alleged federal violation. This holding was repeated most recently in Sansom Committee by Cook v. Lynn, 735 F.2d 1535, 1539 (3d Cir. 1984, rehearing denied 7/6/84), published after the filing of the Petition.

The rulings of courts below thus conflict directly with decisions in other Circuits.

POINT II

Corporation Counsel Erroneously Treats the Petition as Raising the Question of the Facial Validity of City Rent Controls.

Corporation Counsel relies on Benson v. Beame, 50 N.Y.2d 994 (1980), appeal denied 449 U.S. 1119 (1981) and state statutes generally authorizing City rent controls to assert the validity of the City's rent controls (CC 13-19). None of this is responsive to the issues raised by the Petition, which nowhere suggests in any way that City rent controls were illegal as such. Corporation Counsel's argument thus amounts to asserting that

all uses or abuses of the Defendants' powers are conclusively immune per se no matter how applied.

POINT III

The City's Monopolistic Conduct Alleged in the Complaint Dismissed Below Was Neither Approved by the State Nor Rendered Irrelevant by Subsequent State Takeover of Rent Controls, and Caused Petitioners' Nonpayment of City Assessments.

Corporation Counsel has cited no authority whatever remotely suggesting that New York State authorized the City to exercise its regulatory and proprietary powers in such a manner as to amass a dominant position in low and middle income housing by making competing private housing uneconomical and then confiscating it as alleged in the

complaint below (44a-73a) - which must, of course, be taken as true for purposes of testing its dismissal. Compare "...New York City's Biggest Landlord is Now New York City," N.Y. Times 11/27/83, p. 58.

On the contrary, State policy was specifically to foster "the transition to a normal market of free bargaining" (N.Y. Unsolidated Laws § 8602, L. 1962, ch. 21, § 1(2), Petition at 16) and not to permit controls to become more onerous (Urstadt Act, N.Y. Unconsolidated Laws § 8605, L. 1971, ch. 1012, § 1, Petition at 17).

In this context, the conflict between the decision below and those in Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) and Corey v. Look, 641 F.2d 32 (1st Cir. 1981) is glaring. The First and Ninth Circuits refused to infer state authorization for anticompetitive use of municipal regulatory power to hurt

competitors of proprietary activities of the municipality from generally worded state enabling provisions.

Corporation Counsel seeks to avoid the importance of these holdings by stressing that the ultimate conclusion in Parks and Corey was absence of state authorization for the challenged anticompetitive behavior (CC 19-20 & 20 n). What Corporation Counsel does not stress is that the key question was not the presence of overall authority in an area of activity -- but rather the presence or absence of state authorization for the anticompetitive use to which the municipality was alleged to have put its conceded generalized authority. Parks and Corey are inconsistent with finding such

authorization from the mere grant of generalized authority such as that in the present case.

Similarly without support is Corporation Counsel's suggestion that the subsequent 1983 State takeover of rent controls supports dismissal of the complaint (CC 18). The complaint, filed in 1982 before the 1983 takeover, alleged illegal acts before that takeover. The District Court clearly has discretion to fashion appropriate equitable remedies for past violations, such as the return of the properties involved, contemplated by the signed settlement (1 ra) announced by the City in open Court (JA 219) but repudiated and disregarded by the City. See United States v. E.I. DuPont de Nemours & Co., 366 U.S. 316 (1961).

Moreover, the State takeover is doubtless more consistent with concern for the massive destruction of the City's housing stock as described in the complaint than with any retroactive approval of the kinds of conduct alleged below. Compare Severo, "15,000 Seek 208 Brooklyn Apartments," N.Y. Times 8/2/84, p. B3.

The complaint alleged that a multidimensional squeeze imposed on Petitioners by illegal City conduct brought about large and increasing operating losses before any debt service (50a-51a), leading to inability of the properties to pay City taxes which were based on assessed valuations at high multiples of fair market values based on arms' length sales (47a, 55-56a). Yet Corporation Counsel now seeks to rely on

the inability to pay these predatory taxes as a basis for avoiding review of the City's conduct (CC 2).[3]

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[3] As opposed to rents fixed as low as $30.10 per month (56a), the City's monthly rent allowance for a single person is $193. City of New York, Guide to New Public Assistance Rents and Shelter Allowance Procedures 3 (April 1984). Meanwhile, Corporation Counsel has successfully barred all tax certiorari trials involving inequality since 1975 and continues to do so (JA 177-178) despite representations to state and federal courts that this would no longer continue, most recently in Friarton Estates Corp. v. City of New York, 681 F.2d 150, 160 (2d Cir. 1982) where the Court accepted the City's representation that it had "moved to schedule trials with reasonable speed"; see also In Rem Foreclosure, Index No. 46001/77 (Evans, J. 5/15/80), aff'd 79 AD2d 899 (1st Dept. 1980, appeal dismissed, 53 N.Y.2d 195 (1981), cert. denied sub nom. Friarton Estates Corp. v. City of New York, 454 U.S. 837 (1981): "It would, of course, be inequitable to allow in rem foreclosure...if in fact the taxes were improperly overassessed and if [the owners] did not have a reasonable opportunity to obtain a proper assessment. Such a transfer of title would be an unconstitutional taking of property without compensation." JA 178.

Corporation Counsel nowhere questions the catastrophic effects of the conduct alleged in the complaint on the petitioners, on the general public, and on commerce, nor disputes the underlying facts constituting the alleged federal violations.

CONCLUSION

The complaint below alleged massive anticompetitive abuses of municipal power contrary to State law and disregard of a signed written settlement of a federal case solemnly announced to a federal Court. Important questions of federal law involving weighty public as well as private interests are raised by the Petition, justifying review by this Court.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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New York, New York 10166
(212) 867-5500

Counsel of Record for Petitioners

APPENDIX

[JA-168]

The City of New York
Law Department
100 Church Street
New York, NY 10007
Rm. No. 6D7
(212) 566-4159

FREDERICK A. O. SCHWARZ, JR.

Corrected Letter
September 21, 1982

Richard H. Maidman, Esq.
485 Madison Avenue
New York, N.Y. 10017

Re: (1) Rent Control Memorial Corp. v. City of New York

(2) Brontel Ltd. v. City of New York

Dear Mr. Maidman:

This will confirm our understanding relative to the above-captioned actions. Both actions will be discontinued with predujice. As to Block 1599, Lot and Block 1621, Lot 65, this office will recommend to the Comptroller (as part of the Friarton/Sonia package) to reduce the

assessment for all unsettled years for which a tax review petition is pending at 50% of the assessment, provided that there have been no settlements made by the Tax Commission. In the event there have been such settlements, the numbers will have to be examined to yield a fair result. Prior to August 10, 1983, and preferably much sooner, Bronel and Rent Control should apply to the Board of Estimtae for a discretionary release of the City's interest. If they thereafter deposit certified checks for the reduced taxes, etc. in sums sufficient to redeem the property, this office will recommend approval of the applications for redemption to the Department of General Services and the Board of Estimate.

Yours truly,

/s/
JUDAH DICK
Assistant Corporation Counsel

EXHIBIT "C"

[JA 47]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RENT CONTROL MEMORIAL CORP.
and BRONTEL, LTD.,
-v-
THE CITY OF NEW YORK, PHILIP R.
MICHAEL as COMMISSIONER OF
FINANCE OF THE CITY OF NEW YORK
AND TAX COMMISSION OF THE CITY
OF NEW YORK,

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82 Civ 2664 (EW)
ORDER OF DISCONTINUANCE

This cause having come on to be heard before me and the attorneys for all parties having appeared and advised the Court that all claims asserted herein have been settled, it is

ORDERED that the above entitled action be and hereby is discountinued without costs to either party and without prejudice to the right, upon application made within sixty (60) days of the date of this Order, to re-open the action if the settlement is not fully consummated.

Dated: New York, N.Y.
October 19, 1982

/s/ EDWARD WEINFELD
UNITED STATES DISTRICT JUDGE